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REPORTS

OF

CASES RULED AND ADJUDGED

IN THE

SEVERAL COURTS

OF

The United States,

15-912

AND OF

Pennsylvania,

HELD AT THE SEAT OF THE FEDERAL GOVERNMENT.

8/11/1807
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BY A. J. DALLAS.

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VOL. IV.

Atque eo magis necessaria est hæc opera, quod et nostro sæculo non desunt, et olim non defuerunt, qui *hanc juris partem* ita contemnerent, quasi nihil ejus præter inane nomen existeret. GROTIUS.

PHILADELPHIA:

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1807.

MEMORANDUM.

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ERRATA.

Page 96. line 6 from the foot, instead of "*redenda*," read "*reddenda*."
119. line 3, read "died," instead of "did."
214. line 16 from foot, instead of "*sa. sa.*" read "*ca. sa.*"
225. *Wainwright et al.* v. *Crawford.* In this case the verdict was for "the defendant," not "the plaintiffs."
268. line the last. Insert between the words "had" and "doubt," the word "no."
294. *Croussillat* v. *Ball.* In this case, the jury, not being able to agree, were constituted referees, by consent of parties; and it was a report, not a verdict, in favour of the plaintiff.
410. (1) It has recently been suggested, by one of the counsel for the plaintiffs, in *Penn's Lessee* v. *Kline*, (Mr. *Duncan*) that no compromise has taken effect.

SUPREME COURT

OF THE

UNITED STATES.

August Term 1799.

Present ELLSWORTH, Chief Justice.
PATERSON, CHASE, and WASHINGTON, } Justices.

The State of New-York *versus* The State of Connecticut *et al.*

BILL in equity. "The State of *New-York*, one of the *United States* of *America*, by *Josiah Ogden Hoffman*, the attorney-general of the said state," filed this bill in consequence of the rejection of the motion, to grant writs of *certiorari*, for the removal of *Fowler et al.* v. *Lindsey et al.* and *Fowler et al.* v. *Miller* (3 *Dal. Rep.* 411.) from the Circuit Court of *Connecticut* into the Supreme Court. The plaintiffs in those suits were made defendants to the present bill; and the complainant, after setting forth the title of *New-York* to the lands in question, prayed (*inter alia*) for an injunction against them. The notices to the defendants, that the injunction would be moved for, were delivered on the 25th and 26th of *July*; but, on the 6th of *August*,* *Ingersoll*, who appeared for the individuals, though not for the state, referred to the act of congress, which provides, that "no "writ of injunction shall be granted, in any case, without reasonable previous notice to the adverse party, or his attorney, "of the time and place of moving for the same:" 2 *vol.* 228. *s.* 5. *Swift's edit.* And he contended, that reasonable notice had not been given in this case.

* The term commenced on the 5th of *August*, but a quorum of the judges did not attend till the day following; and CUSHING and IREDELL, *Justices*, were prevented by indisposition from taking their seats on the Bench, during the whole term.

1799. *Hoffman*, (the attorney-general of *New-York*) contended that the notice was reasonable in relation to its present object; though it might not be sufficient for requiring the defendant to put in an answer, or demurrer, to the bill. The injunction prayed for, is not a perpetual one, but only till answer, and further order of the Court. Nor ought the section of the act of congress to be extended by construction; for, a universal application of the rule, would be unreasonable, and, in many cases, enable the party to defeat the very purpose of an injunction. It is questionable, indeed, whether the section at all relates to a motion, either in the Supreme Court, or the Circuit Court, for an injunction; since its only object seems to have been, to vest in a single Judge the same power that the Courts previously possessed, to grant the writs of injunction and *ne exeat*. But, at all events, if the Court shall think notice of such a motion necessary, they will construe the shortest notice to be reasonable notice, for the purpose of preserving peace, and effectuating justice.

Ingersoll, in reply. With respect to the state of *Connecticut*, it is a fact, that since the decision on the motion for a *certiorari*, at the last term, there has not been a meeting of the legislature; so that it is impossible to ascertain what course she will adopt on the occasion: and with respect to the individual plaintiffs in the Circuit Court, it is a matter of great importance that a trial on their rights should not be suspended, by the interposition of a state, whose interests cannot be affected by any decision that may be given below. It is enough, however, that by the positive provisions of the act of congress, it is contemplated, that no injunction shall issue, in any case, unless satisfactory reasons are assigned; and that, therefore, reasonable notice of an application for the writ, must be given to the adverse party.

The opinion of the COURT was delivered by the *Chief Justice*.

ELLSWORTH, *Chief Justice*. The prohibition contained in the statute, that writs of injunction shall not be granted, without reasonable notice to the adverse party, or his attorney, extends to injunctions granted by the Supreme Court, or the Circuit Court, as well to those that may be granted by a single Judge.

The design and effect, however, of injunctions, must render a shorter notice *reasonable* notice, in the case of an application to a Court, than would be so construed, in most cases of an application to a single Judge: and, until a general rule shall be settled, the particular circumstances of each case must also be regarded.

Circumstanced as the present case is, the notice, which has been given, is, in the opinion of the Court, sufficient, as it respects the parties against whom an injunction is prayed.

The

The Same Cause.

1799.

THE bill in this case contained an historical account of the title of *New-York* to the soil and jurisdiction of the tract of land in dispute; set forth an agreement of the 28th of *November* 1683, between the two states on the subject; and prayed a discovery, relief, and injunction to stay the proceedings in the *Connecticut* ejectments. 3 *Dall.* 411. As the state had not appeared, the question of injunction was the only one now argued.

Hoffman (the attorney-general of *New-York*), in support of the prayer for an injunction, and the general merits of the bill, urged various points, with great force and ability. 1st. *It is necessary to execute the special agreement between the states.* It is a principle of equity, that wherever there is an agreement, as to a right, whether it is a mere franchise, or a right of soil, it shall be enforced, and rendered conclusive upon the parties, by the interposition of the Court. The agreement admits that the tract of land belonged to *New-York*; and the bill states, that notwithstanding this admission, *Connecticut* has since undertaken to grant a part of it to the plaintiffs in the ejectments. Hence, it became necessary (or the bill would have been incomplete) to make those plaintiffs, parties to the present suit. The agreement, indeed, only gives the equitable title to *New-York*; while the plaintiffs below possess the legal title, and must, of course, recover in the ejectments. A specific performance of the agreement being decreed against *Connecticut*, would not be an adequate and complete remedy; and all parties in interest, however remote, must be brought before the court, or they cannot be affected by its proceedings. 2d. *It will prevent a multiplicity of suits.* The bill is emphatically a bill of peace; since, considering the character of the parties to the principal controversy, without this remedy, the consequences upon the public tranquillity can hardly be conjectured. It is true, however, that the right of the state of *New-York* cannot be affected by a decision in the Circuit Court; but till that right is lawfully settled, the number of suits, by individuals, must be indefinitely great; and merely to avoid a multiplicity of suits, to cut off, by one decision, various sources of strife and litigation, is a substantive ground for the exercise of a chancery jurisdiction. 1 *Atk.* 282. 2 *Atk.* 484. 3d. *It is a bill for the discovery of title*, which parties in interest, as well as parties in possession, may certainly maintain. 1 *Vez.* 249. (1) 4th. *It is is a bill to*

(1) WASHINGTON, *Justice*.—Does the bill state, that the plaintiff is ignorant of the defendant's title?

Hoffman. Yes, expressly.

WASHINGTON, *Justice*. Then you are aware, that if the injunction should be granted upon that ground, it must, of course, be dissolved, as soon as the discovery is obtained.

settle

1799. *settle a question of boundary between two states.* Of this question the Court can, incontestably, take cognizance; and it will not allow the decision of the principal matter to be interrupted, or prevented, by collateral considerations; particularly, when the decision of the principal, will settle all the inferior matters in disptue. In *Penn* v. *Baltimore*, 1 *Vez.* 454. the bill was sustained upon similar principles; and the jurisdiction there assumed upon principle, in a case of contested provincial boundary, may surely be exercised here under the additional sanction of the constitution. 2 *Dall.* 442. 415. 419. 3 *Dall.* 1. 412. But it is not simply a bill to settle a question of boundary between two states: it involves the right of soil, which, in relation to a great part of *New-York*, results from the right of jurisdiction; so that deciding the latter, is virtually a decision of the former. In this respect *New-York* is, perhaps, distinguished from her sister states, whose claims of territory are, generally, founded upon positive grant; while her claim of soil is a mere incident of the sovereignty and jurisdiction, with which the revolution invested her. (2)

Ingersoll, against granting the prayer for an injunction. In the suits below, the state of *New-York* is not a party, and cannot be affected by their decision; while the defendants below are not parties to the present bill, though they are the persons most likely to be injured by those suits. But no part of the bill states, that any of the land belongs to *New-York*; so *non constat* that she is interested in the question of soil; and the question of state boundary cannot be decided, as between the states, in the Circuit Court. (3) There is no instance of the interposition of a court of

(2) PATERSON, *Justice*. Generally speaking, the proposition is true, that, as to states, jurisdiction and the right of soil, go together.

(3) ELLSWORTH, *Chief Justice*. If the bill contains no averment of a right of soil in *New-York*, I think it must be defective, and lays no foundation for an injunction. To have the benefit of the agreement between the states, the defendants below (who are the settlers of *New-York*) must apply to a court of equity as well as the state herself; but, in no case, can a specific performance be decreed, unless there is a substantial right of soil, not a mere political jurisdiction, to be protected and enforced. Besides, is not the bill, likewise, defective for want of making the defendants below parties to it?

CHASE, *Justice*. The validity of the grant of either state must depend upon the question of boundary; for, neither *New-York*, nor *Connecticut*, could grant land, which it did not own. Hence, I think, the question of boundary must necessarily arise in the suits below.

PATERSON, *Justice*. On the question just proposed by the Chief Justice, it may be remarked, that some difficulty would occur in sustaining a bill in this court, at the suit of the defendants below. But it does not appear to me, that any of the cases in the books apply to the present case. What does the bill present? A case of disputed boundaries between two states; and the question of soil, on their conflicting grants, must be decided by the question of jurisdiction. The state of *Connecticut* has granted out the *Gore*. The state of *New-York* has, also, granted out the *Gore*. The grantees of *Connecticut* have brought suits in *Connecticut* against the grantees of *New-York*, and will obtain possession of the land. If the grantees of *New-York* are thus evicted, they will bring suits in

of equity, by way of injunction, unless upon the application of a party immediately interested in the subject of the common law suits, or there is property likely to be withdrawn. 1 *Ch. Prec.* 186, 7. *Gilb. Ch.* 19. 2 *Dall.* 402. 5 *Bot. Car. Canc.* 439. *Hind. Ch.* 585. Besides, there is a regular course, in which the judgment of this court, independent of its equity character, may be obtained; as by a writ of error, on a demurrer to evidence, the construction and effect of the alleged agreement between the states, might here be revised, and authoritatively declared; and "suits in equity cannot be sustained in any Court of the *United* "*States*, in any case where plain, adequate, and complete remedy, "may be had at law:" (4) 1 *vol.* 59. *s.* 16. *Cowp.* 215, 6. 2 *H. Black.* 187. An eventual responsibility cannot constitute a party to the suits below. The several states should, in justice, refund the price of the confiscated estates, if those, who have now brought suits against the purchasers under their respective laws, should succeed; and *Pennsylvania* was bound, in honour, to compensate General *Irwine*, for the loss of *Montour's* island, on the failure of the title derived from her grant: 3 *Dall. Rep.* 425. but, surely, such considerations will not constitute parties to a judicial proceeding. As to a discovery of title, by whom, and against whom, is it sought? One party to the suit, does not require it from another; but a third person requires it, in a suit, to which he is not a party, and the decision in which cannot affect his right, whatever it may be. 1799.

Lewis, for the complainant, in reply. The difficulties of the case are obvious to all; and, unless the present remedy is applied, the difficulties will dangerously increase. If the lands are not in *Connecticut*, the ejectments are *coram non judice*. If they are not in *New-York*, suits there would be equally objectionable. Neither state will be satisfied, however, by the judgment of a Court held in the other; and for want of a peaceful forum to decide the controversy, an odious and vindictive litigation may be perpetuated. But this Court has a constitutional jurisdiction on a question of boundary between states; and, upon such an occasion, will be eager to exercise it. The interest of *New-York*, too, is sufficient to justify the exercise of it, upon her application. The right and possession of a sovereign state, are not to be treated like the usufructuary right, the *possessio pedis*, of a farmer. A sovereign state possesses what she governs. But is not *New-York* interested, even in a pecuniary point of view, so as to claim the in-

in *New-York*, and, in their possession. But where will this feud and litigation end? It is difficult and painful to conjecture, unless this Court can, under the constitution, lay hold of the case to decide the question of boundary, which will be a decision of all the appendages and consequences.

(4) PATERSON, *Justice*. The rule was so before, and is so independent of the provision in the act of congress.

terposition

1799. terposition of this Court, to which her settlers, the defendants below, cannot originally resort? It is a fundamental principle of the law of nature and of nations, that every government is bound to preserve peace and order, to protect individuals, to indemnify those who trust to its faith, and to prevent a dismemberment of its territory. This political and moral obligation, enforced by a regard to her public improvements, and fiscal operations, creates an interest of the highest character in the government of *New-York*; and such as the Court will cherish with all its benevolence and authority. 21 *Vin. Abr.* 181. *pl.* 1. *Ibid.* 183. *pl.* 4, 5. 7. *Ibid. pl.* 8. 11. 3 *Black. Com.* 255, 6.

The COURT, after advisement, delivered their opinion, that as the State of *New-York* was not a party to the suits below, nor interested in the decision of those suits, an injunction ought not to issue.

Injunction refused. (5)

The same Cause.

AS the state of *Connecticut* did not appear, *Hoffman* moved that she should appear on the first day of next term, or that the plaintiff be then at liberty to proceed *ex parte*. 3 *Dal.* 335. But *Lewis* observed, that the rule required that a *subpoena* issuing in a suit in equity, should be served sixty days before the return; which had not been done in the present case. The first motion was, thereupon, waived; and an *alias subpoena* awarded. 3 *Dall.* 320.

Hazlehurst *et al. versus* The United States.

IN error from the Circuit Court for the district of *South-Carolina*. A rule had been obtained by *Lee*, the attorney-general, at the opening of the Court, that the plaintiffs appear and prosecute their writ of error within the term, or suffer a *non-pros.*: but it was found, that errors had been assigned in the Court below, and

(5) *Hoffman.* In every grant by *New-York*, there is a reservation of gold and silver mines, and of five acres per cent. for roads. The bill might, besides, be amended, by averring the state to be interested in a residuum of the land, if that would be sufficient to sustain the prayer for an injunction.

WASHINGTON, *Justice.* The amendment would not satisfy me; for, my opinion is founded upon the fact, that *New-York* is not interested in the suits below.

CHASE, *Justice.* It is a mere bill to settle boundaries; and we must take it as we find it; not as it might be made.

ELLSWORTH, *Chief Justice.* If there had been a quorum of judges, without my attendance, I should have declined sitting in this cause. As it is, I am glad that the opinion of my brethren, dispenses with the necessity of my taking a part in the decision.

a joinder

a joinder in error entered here. The rule was, therefore, changed to the following: "that unless the plaintiffs in error appear and argue the errors to-morrow, a *non-pros.* be entered." The plaintiffs not appearing, the writ of error was non-prossed, according to the rule. 1799.

Turner, Administrator, *versus* Enrille.

ERROR from the Circuit Court of *South-Carolina*. The record, as abridged for the Judges, presented the following case:

"The Marquis de Caso *Enrille* instituted an action on the case against *Thomas Turner*, the administrator of *Wright Stanley*, in the Circuit Court of *North-Carolina*, of *June* term 1795.

"A declaration in case was filed '*by the Marquis de Caso Enrille, of in the island of* ' of *June* term 1796, in which it is set forth, that *Wright Stanley* (the intestate) and *John Wright Stanley* and *James Greene* were '*merchants and partners at Newbern in the said district:*' that *Wright Stanley* survived the other partners; that on the 4th of *June* 1791, in the lifetime of all the partners, they were indebted '*unto the said Marquis in dollars;*' and in consideration thereof, assumed to pay, &c. *The 2d count insimul computassent*, when the said partners '*were found in arrear to the said Marquis in other dollars,*' &c. The plaintiff concludes with the usual averments of non-payment, '*to the damage of the said Marquis dollars,*' &c.

"On the 30th of *November* 1796, the defendant appeared, and pleaded, 1st. Non assumpsit intest. Replication and issue. 2d. The statute of limitations as to the intestate: Replication, *an account current between merchant and factor*. Rejoinder and issue. 3d. Set-off, that the plaintiff was indebted to the intestate, on the 1st of *January* 1792, in more than the damages by the plaintiff sustained, &c. to wit, in 4000 dollars, for money had and received by the plaintiff to the intestate's use, which sum is still due to the defendant, as administrator. Replication that plaintiff owed nothing, &c. Rejoinder and issue. 4th. The statute of limitations as to the administrator. Replication that the demand was made within three years, &c. Rejoinder and issue. 5th. Plene administravit. Replication assets. Rejoinder and issue.

"On the 1st of *June* 1799, the issues were tried, a verdict was given on all the issues for the plaintiff, and the jury assessed damages at 3289$\frac{63}{100}$ dollars. Judgment for damages, costs and charges.

"Writ of error. Errors assigned: 1st. That it does not appear on the pleadings, &c. that either plaintiff or defendant was an alien or that they were citizens of different states. 2d. That there are blanks in the declaration for places, dates, and sums. 3d. The general errors. Plea, *In nullo est erratum*. Replication and issue."

For

1799. For the defendant in error, *Dallas* lamented the obvious irregularities on the face of the record, though the merits were incontestably established in his favour, by the verdict and judgment. He thought, however, that the Court would give every reasonable intendment to the allegations of the record, in support of the judgment and verdict; and, therefore, endeavoured to distinguish the present case from the case of *Bingham* v. *Cabot et al.* 3 *Dall. Rep.* 382. In *Bingham* v. *Cabot et al.* the defendant's place of residence was not even stated; here the defendants are stated to be merchants of *Newbern*, in the district of *North-Carolina*. There the plaintiffs were described generally of *Massachusetts*, &c.: here the plaintiff is described specially of *an island;* and the cause of action is found to arise on accounts between merchant and factor. It has not been judicially decided that the averment of alienage, or of citizenship of different states, as a foundation for the federal jurisdiction, must be positive; and it is sufficient, in reason, if circumstantial evidence of the fact can be collected from the record. As to the blanks in the declaration, in relation to the sums, *Dallas* requested an opportunity to consider how far the defect was cured by the verdict, or might be amended, if the Court was not decisively against him on the first point.

Ingersoll, for the plaintiff in error, observed, that the case was so very desperate, that it had been virtually abandoned by the opposite counsel. He should, therefore, decline troubling the Court.

By the COURT. The decision in the case of *Bingham* v. *Cabot et al.* must govern the present case. Let the judgment be reversed with costs.

Turner, Administrator of Stanley, Plaintiff in Error, *versus* the President, Directors, and Company, of the Bank of North-America, Defendants.

ERROR from the Circuit Court of *North-Carolina*. This was an action upon a promissory note drawn, in *Philadelphia*, by *Stanley*, the intestate, in favour of *Biddle* & Co. and indorsed by *Biddle* & Co. to the bank of *North-America*. The declaration (which contained only a count upon the note itself) stated, that the president and directors of the bank were citizens of the state of *Pennsylvania*; and that *Turner* the administrator, and *Stanley*, the intestate, were citizens of the state of *North-Carolina*; but of *Biddle* & Co. the payees, and indorsers of the note, there was no other designation upon the record, than "that they used trade and merchandize in partnership together, at *Philadelphia*, or *North-Carolina*." The error assigned, and insisted upon, to wit, an insufficient description of *Biddle* & Co. was founded on

on that part of the 11th section of the judicial act (1 *vol.* 55.) which declares, that no District or Circuit Court "shall have "cognizance of any suit to recover the contents of any promis- "sory note, or other chose in action, in favour of an assignee, "unless a suit might have been prosecuted in such Court, to "recover the said contents, if no assignment had been made, "except in cases of foreign bills of exchange." 1799.

Ingersoll, for the plaintiff in error, argued, that unless it was averred upon the record, that the original parties to the note, as well as the parties to the suit, were of different states, or one a citizen, and the other an alien, it could not judicially appear, that the Circuit Court had jurisdiction of the cause. Though the federal Courts are not to be regarded as *inferior* Courts, they are Courts of a *limited* jurisdiction. The jurisdiction of the state Courts is general; but the jurisdiction of the federal Courts is special, and in the nature of an exception from the general jurisdiction of the state Courts. That the parties are citizens of different states, is one ground for the exception; and so far as respects the immediate parties to the suit, the ground for the exception sufficiently appears upon the record. But if an action is brought by the indorsee of a promissory note, he cannot have the benefit of the exception, unless he shows that his indorser, as well as himself, was entitled to resort to a federal tribunal. Congress knew, that the *English* Courts had amplified their jurisdiction, through the medium of legal fictions; and it was readily foreseen, that by the means of a colourable assignment to an alien, or to the citizen of another state, every controversy arising upon negotiable paper, might be drawn into the federal Courts. Hence, the original character of the debt is declared to be the exclusive test of jurisdiction, in an action to recover it. Unless the original character of the note furnished a subject of federal jurisdiction, it is emphatically declared, that "no District or Circuit Court shall have cognizance of the suit;" and a court of special jurisdiction cannot take cognizance of the suit, unless the case judicially appears by the record to be within its jurisdiction. 9 *Mod.* 95. *Lord Coningsby's case.* So, wherever a party takes advantage of a clause in a statute, to which a proviso is attached, he must not only bring his case within the general clause, but show that it is not affected by the proviso. 5 *Bac. Abr.* 666. *Plowd.* 410. *Raym.* Nor is the present, too late a period, to take advantage of the defect. Silence, inadvertence, or consent, cannot give jurisdiction, where the law denies it. In *Bingham* v. *Cabot.* 3 *Dall.* 382. the ground of jurisdiction was more strongly laid; and yet a similar defect was successfully assigned for error.

Rawle, for the defendant in error. It is not intended to controvert the general proposition, that where a suit is brought before an *inferior* Court, the circumstances that gave it jurisdiction,

1799. must be set forth on the record; and, if they are omitted, it may be taken advantage of upon a writ of error. But the Circuit Court is not, in technical language or intendment, an *inferior* Court; and this consideration alone destroys the application of most of the *English* authorities. It is, then, to be remarked that the judicial power, is the grant of the constitution; and congress can no more limit, than enlarge, the constitutional grant. In the 2d section of the 3d article, the constitution contemplates the parties to the controversy, as alone raising the question of jurisdiction; and if the existing controversy is "between citizens of different states," the judicial power of the United States expressly extends to it. (1) By the opposite construction, however, congress has imposed a limitation upon the judicial power, not warranted by the constitution, when, without regard to the immediate parties to the controversy, the law excepts from the cognizance of the federal Courts, suits upon promissory notes, which by assignment, have placed the immediate parties, in the relation of citizens of different states. If the Circuit Court is not an *inferior*, neither is it, in the sense asserted, a *limited* jurisdiction, but it is a Court of *general jurisdiction*, having some cases expressly excepted from its cognizance. It may be compared to the *King's Bench* in *England*, from whose general jurisdiction is excepted the cognizance of cases, belonging to the counties palatine. *Carth.* 11, 12. 354. 1 *Saund.* 73. 2 *Mod.* 71, 2, 3. As to such Courts, it is sufficient if it appears to the appellate authority, that from the subject matter, the Court below might have jurisdiction; and, at all events, it would be too late, in a writ of error, to take the exception—an objection not suggested in *Bingham* v. *Cabot*. Then, here the *parties* are stated to be citizens of different states; the place was not exempt from federal jurisdiction; and the nature of the controversy did not, of itself, deprive the Circuit Court of its general cognizance of suits, between citizens of different states.

The *Chief Justice* delivered the opinion of the COURT, in the following terms:

ELLSWORTH, *Chief Justice*. The action below was brought by the president and directors of the bank of *North-America*, who

(1) ELLSWORTH, *Chief Justice*. How far is it meant to carry this argument? Will it be affirmed, that in every case, to which the judicial power of the *United States* extends, the federal Courts may exercise a jurisdiction, without the intervention of the legislature, to distribute, and regulate, the power?

CHASE, *Justice*. The notion has frequently been entertained, that the federal Courts derive their judicial power immediately from the constitution; but the political truth is, that the disposal of the judicial power, (except in a few specified instances) belongs to congress. If congress has given the power to this Court, we posess it, not otherwise: and if congress has not given the power to us, or to any other Court, it still remains at the legislative disposal. Besides, congress is not bound, and it would, perhaps, be inexpedient, to enlarge the jurisdiction of the federal Courts, to every subject, in every form, which the constitution might warrant.

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are well described to be citizens of *Pennsylvania*, against *Turner* and others, who are well described to be citizens of *North-Carolina*, upon a promissory note, made by the defendant, payable to *Biddle* & Co., and which, by assignment, became the property of the plaintiffs. *Biddle* & Co. are no otherwise described, than as "using trade and merchandize in partnership together," at *Philadelphia* or *North-Carolina*. And judgment was for the plaintiff. 1799.

The error assigned, the only one insisted on, is, that it does not appear from the record, that *Biddle* & Co. the promisees, or any of them, are citizens of a state other than that of *North-Carolina*, or aliens.

A Circuit Court, though an *inferior* Court, in the language of the constitution, is not so in the language of the common law; nor are its proceedings subject to the scrutiny of those narrow rules, which the caution, or jealousy, of the Courts at *Westminster*, long applied to Courts of that denomination; but are entitled to as liberal intendments, or presumptions, in favour of their regularity, as those of any Supreme Court. A Circuit Court, however, is of *limited* jurisdiction; and has cognizance, not of cases generally, but only of a few specially circumstanced, amounting to a small proportion of the cases, which an unlimited jurisdiction would embrace. And the fair presumption is (not as with regard to a Court of general jurisdiction, that a cause is within its jurisdiction unless the contrary appears, but rather) that a cause is without its jurisdiction till the contrary appears. This renders it necessary, in as much as the proceedings of no Court can be deemed valid further than its jurisdiction appears, or can be presumed, to set forth upon the record of a Circuit Court, the facts or circumstances, which give jurisdiction, either expressly, or in such manner as to render them certain by legal intendment. Among those circumstances, it is necessary, where the defendant appears to be a citizen of one state, to show that the plaintiff is a citizen of some other state, or an alien; or if (as in the present case) the suit be upon a promissory note, by an assignee, to show, that the original promissee is so: for, by a special provision of the statute, it is his description, as well as that of the assignee, which effectuates jurisdiction.

But here the description given of the promissee only is, that "he used trade" at *Philadelphia* or *North-Carolina*; which, taking either place for that where he used trade, contains no averment that he was a citizen of a state, other than that of *North-Carolina*, or an alien; nor any thing which, by legal intendment, can amount to such averment. We must, therefore, say that there is error.

It is exceedingly to be regretted, that exceptions which might be taken in abatement and often cured in a moment, should be reserved to the last stage of a suit, to destroy its fruits.

Judgment reversed.

SUPREME COURT

OF THE

UNITED STATES.

February Term 1800.

Present CUSHING,
PATERSON,
CHASE, and
WASHINGTON, } Justices.

Mossman, surviving Executor, Plaintiff in Error, *versus* Higginson, surviving Partner, Defendant in Error.

THIS was a writ of error, to remove the proceedings on a bill in equity, from the Circuit Court, for the district of *Georgia*, tested the 27th *November* 1798, returnable on the next. The case, on the bill and pleadings, was, briefly, this:—*Alexander Willy*, an inhabitant of *Georgia*, being indebted to *Higginson* and *Greenwood*, *British* merchants, gave them a bond and mortgage, payable the first of *January* 1773. In the year 1778, *Willy* was banished from the state of *Georgia*, and his estate confiscated by law. The mortgaged premises were seized and sold by the commissioners for forfeited estates, to certain purchasers, who afterwards sold the same to *James Houston*; and the property remained in his possession, or in the possession of his executors, until the 12th of *September* 1796, when it was levied upon, sold, and conveyed to *William Mien*, by the creditors of *Houston*; notice of the mortgage having been given to *Mossman*, the executor of *Houston*, to *Mien*, the agent for his creditors, and to the marshal, before the sale. In *March* 1797, *Higginson*, the surviving mortgagee, filed the present bill to foreclose the equity of redemption, stating himself to be *a subject of Great Britain*; but in no part of the proceedings, were the defendants, or any of them, stated to be *citizens of the United States*. The defendants pleaded the confiscation laws of *Georgia* in bar, and answered to

to the merits; but WASHINGTON, *Justice*, over-ruled the pleas, and decreed, that unless *William Mien* paid the principal and interest of the debt, before the 17th of *February* 1799, the equity of redemption should be foreclosed. The merits of the decree were not, however, discussed on the writ of error, but the following points occurred: 1800.

I. *Dallas*, for the plaintiff in error, moved to amend the writ, by inserting the return day of the present term in the blank. The writ is regularly tested, and by indorsements it appeared when it was filed below, and when it was filed here. The clerk of the Circuit Court had, also, indorsed, "Returnable to *February* term 1799." There is, therefore, sufficient matter to amend by; and the amendment is within the provision of the act of congress, 1 *vol.* 72. *s.* 32.

By the COURT. Let the amendment be made.

II. It was objected by *Ingersoll* and *Dallas*, for the plaintiff in error, that the jurisdiction of the court, did not appear upon the record, as there was no designation of the citizenship of the defendants. 3 *Dall. Rep.* 382. 369. 4 *Dall. Rep. ant.* 8. *Turner* v. *Enrille.*

It was answered by *E. Tilghman* and *Reed* (of *South-Carolina*) that as no process was prayed against *Willy*, he was not, in legal contemplation, a party to the suit; 1 *P. Wm.* 593. that the prayer of process against *Mossman*, who never held the land, was irregular, and to be regarded as mere surplusage; that there was no pretence to charge *Houston*; and that *Mien*, being expressly stated to be the purchaser of the land, the Court will take notice of the law of *Georgia*, by which no alien can hold real estate; and, by necessary implication, the purchaser must be a citizen. Besides, it is enough under the constitution, the treaty of 1783, and the 11th section of the judiciary act, that an alien is a party to the suit, whose real object is the thing mortgaged, a proceeding in *rem*, and not a personal recovery. At all events, the Court will permit the defect to be amended.

Ingersoll, in reply. The judiciary act was only intended to carry the constitution into effect, and cannot amplify, or alter, its provisions. The constitution no where gives jurisdiction (nor has any Judge ever countenanced the idea) in suits between alien and alien. It is not an exception to the rule, that the bill in equity, is in the nature of a proceeding *in rem:* for, there cannot be a foreclosure of the equity of redemption, without a personal suit. It is not like the case of a monition to condemn a prize ship, which is notice to all the world, and no party respondent is requisite; and the supposed inference of citizenship from purchasing land fails, when it is recollected, that the purchase does not fix the use. The jurisdiction of the federal Courts (*Const. art.* 3. *s.* 2.)

1800. s. 2.) is not where *a question* arises, that may be affected by a treaty, but where *a case* arises under a treaty; and if a question on the validity of a treaty, arises in a state Court, there is a special provision for transfering it to the Supreme Court; 1 *vol.* 61. *s.* 22. But, in the present instance, it does not appear that any question can arise under the treaty; for, it is not referred to, directly, nor indirectly, in any part of the record. As to an amendment, there is nothing to amend by. The citizenship of the defendants could only be judicially known, by the admission of the parties, or by evidence of the fact. It is not expressly, or impliedly admitted; and this Court cannot try an issue to ascertain it.

By the COURT: The decisions, on this subject, govern the present case; and the 11th section of the judiciary act can, and must, receive a construction, consistent with the constitution. It says, it is true, in general terms, that the Circuit Court shall have cognizance of suits "where an alien is *a party;*" but as the legislative power of conferring jurisdiction on the federal Courts, is, in this respect, confined to suits *between citizens and foreigners*, we must so expound the terms of the law, as to meet the case, "where, indeed, an alien is one party," but a citizen is the other. Neither the constitution, nor the act of congress, regard, on this point, the subject of the suit, but the parties. A description of the parties is, therefore, indispensable to the exercise of jurisdiction. There is here no such description; and, of course,

The writ of error must be quashed.

Cooper *versus* Telfair.

ERROR from the Circuit Court for the district of *Georgia*. The record exhibited the following case:

Basil Cooper, at present of the island of *Jamaica*, in the dominions of his *Britannic* majesty, formerly an inhabitant of the state of *Georgia*, brought an action in the Circuit Court of *Georgia* to *November* term 1797, against *Edward Telfair*, of the district of *Georgia*, upon a bond for 1000*l.* sterling, equal to 4285$\frac{7}{100}$ dollars, dated the 14th of *May* 1774.

After oyer of the bond and condition, the defendant pleaded in bar, 1st. Payment. 2d. "That, on the 4th day of *May* 1782, an act "was passed by the legislature of the state of *Georgia* entitled 'An "act for inflicting penalties on and confiscating the estate of such "persons as are therein declared guilty of treason, and for other pur-"poses therein mentioned,' by which it is, among other things en-"acted and declared, 'that all and every the persons, named and in-"cluded in the said act, are banished from the said state; and that "all and singular the estate real and personal of each and every of "the aforesaid persons, which they held, possessed, or were entitled

" titled to in law, or equity, on the 19th day of *April* 1775, and 1800.
" which they have held since, or do hold, in possession, or others
" holding in trust for them, or to which they are, or may be,
" entitled in law, or equity, or which they may have, hold, or be
" possessed of in right of others, together with all debts, dues
" and demands of whatsoever nature, that are or may be owing to
" the aforesaid persons, or either of them, be confiscated to and for
" the use and benefit of this state.' That the said *Basil Cooper* is
" expressly named and included in the above in part recited acts;
" and that he was on the said 4th day of *May* 1782, and for a
" long time before a citizen of the state of *Georgia*, and of the
" *United States* of *America*. That the said *Basil Cooper*, being a
" citizen, &c. owing allegiance, &c. on the 4th of *May* 1782, and for
" a long time before, adhered to the troops of his *Britannic* ma-
" jesty, then at open war with the said state of *Georgia* and *United*
" *States* of *America*, and did take up arms with the said troops, &c.
" That the said *Basil Cooper* hath never since returned within the
" limits and jurisdiction of the said *United States*, or either of
" them. That by virtue of the above recited act, and, also, of an
" act entitled ' An act to continue an act to authorise the auditor
" to liquidate the demands of such persons as have claims against
" the confiscated estates, and for other purposes therein mention-
" ed,' passed the 13th *February* 1786; and of another act entitled
" ' An act to compel the settlement of the public accounts, for
" inflicting penalties on the officers of this state, who may neglect
" their duty, and for vesting the auditors with certain powers for
" the more speedy settlement of the accounts of this state, with
" the *United States*,' passed the 10th of *February* 1787; the sum
" of money mentioned in the condition of the bond, and all interest
" thereon, have become forfeited and confiscated to the state of
" *Georgia*; and the right of action attached thereto; and no cause
" of action hath accrued to the said *Basil Cooper* to demand and
" have of the said *Edward Telfair*, the said sum of money &c."

To this plea, the plaintiff replied, " that he was never tried,
" convicted, or attainted, of the crime of treason alleged against
" him; and that by the constitution of the state (in force at the
" time of passing the acts in the said plea set forth, to wit, on
" the 4th day of *May* 1782), unanimously agreed to in a con-
" vention of the people of this state, on the 5th of *February*
" 1777, it is ordained, that

" *Article* 1. The legislative, executive, and judiciary, depart-
" ments shall be separate and distinct, so that neither exercise
" the powers properly belonging to the other.

" *Article* 7. The house of assembly shall have power to make
" such laws and regulations, as may be conducive to the good
" order and well-being of the state, provided such laws and re-
" gulations be not repugnant to the true intent and meaning of
" any rule, or regulation, contained in this constitution.

" *Article* 39.

1800. "*Article* 39. All matters of breach of the peace, felony, mur-
"der, and treason against the state, to be tried in the county
"where the crime was committed, &c.

"*Article* 60. The principles of the *habeas corpus* act shall be
"part of this constitution.

"*Article* 61. The freedom of the press, and the trial by jury,
"to remain inviolate forever.

"And that the said recited acts, so far as they can operate
"to bar the said *Basil* from maintaining his action, are repug-
"nant to the true intent and meaning of divers rules and regu-
"lations contained in the said constitution, and are as to the
"action of the said *Basil* null and void: Without that, &c."

The defendant demurred to the replication; and the plaintiff joined in demurrer.

On the 2d of *May* 1799, the Circuit Court, composed of ELLSWORTH, *Chief Justice*, and CLAY, *District Judge*, decided, that the replication was insufficient; that the plea in bar was sufficient; and that judgment on the demurrer be entered for the defendant.

Upon this judgment the present writ of error was brought, and the following errors assigned:

1. The general errors.

2. That the plea does not set forth the constitutional power of the legislature of *Georgia*, to deprive the plaintiff of his rights as a citizen; and, on their own authority, to pass sentence of of confiscation and banishment.

3. That the judgment decides that the legislature had cognizance of the treason alleged against the plaintiff and could legally try, convict, and banish him; whereas they had no such power on constitutional principles.

4. That by the judgment it appears, the legislature could deprive individuals of their lives and property, without trial by jury, or inquest of office, contrary to the constitution of *Georgia*.

5. That the judgment gives effect to an act of *Georgia*, which is an union and usurpation of judicial, as well as legislative powers; which powers the constitution declares should be kept separate.

The case was argued by *E. Tilghman*, for the plaintiff, and by *Ingersoll* and *Dallas*, for the defendant, on the 7th of *February* 1800, upon the general question, whether the confiscation acts of *Georgia*, were repugnant to the constitution of the state, and, therefore, void?

For the Plaintiff: 1st. If the law is contrary to the constitution, the law is void; and the judiciary authority, either of the state, or of the *United States*, may pronounce it to be so. 2 *Dall.* 308. 410. 3 *Dall.* 383. 2d. The law is contrary to the constitution, inasmuch as it is an exercise of the judicial power, by the legislative

tive authority, in opposition to an express prohibition of such an union of jurisdiction. That acts of attainder, banishment, and confiscation, are an exercise of judicial power, the *English*, as well as the *American*, authorities, clearly establish. 2 *Woodes. Lect.* 621, 2. 11 *State Trials*, 25. 6 *State Trials*, 405. 4 *Co. Inst.* 2 *Woodes.* 147. 3 *Dall.* 389. 3. Whatever right *Georgia* had to *confiscate* the property of her enemy; yet, as the pleadings show the plaintiff to have been a citizen, his property could only be forfeited by the regular judgment of a Court, upon a trial by his peers, or the law of the land. As the case is now presented, it is a legislative act, by which the property of an individual citizen is arbitrarily taken from him, and given to the state of *Georgia*. 3 *Dall.* 388, 389. 1800.

For the defendant: It is conceded, that if the law plainly and obviously violates the constitution of *Georgia*, it is void, and never was a valid rule of action. The only question, therefore, to be discussed, is, whether such a fatal collision actually exists? Or, in other words, whether the legislature of *Georgia* had a power, consistently with the constitution, to pass a law, confiscating the property of her own citizens, who had fled beyond the reach of the ordinary legal process? 1st. *Georgia*, at the time of passing the law, was a sovereign, independent, state, with all the rights, prerogatives, and powers resulting from that character; except so far as she had expressly devolved on congress, a portion of her sovereignty; an exception that does not affect the present case. 2d. To a corporation of the most limited nature, the power of passing by-laws is a necessary incident. And to every sovereign legislature, an indefinite power of making laws, is equally an incident, restricted only by impossibilities; for, even if they should be against natural justice, *Blackstone* tells us, they would be valid. 3d. The constitution of *Georgia* does not declare, that "no bill of attainder shall be passed." There is, therefore, no express restriction of the sovereign legislative authority upon the subject; and to decide in favour of the restriction, would be to make, *ex post facto*, not to enforce, the constitution of *Georgia*. 4th. Such acts of attainder and confiscation were not novelties in *America*, any more than in *England*. 2 *Woodes. Lect.* 621. 624. 497, 498. 622. See *confiscation acts of the several states.* They are exercises of political authority, rather than of judicial power: they are laws, not judgments. And as the power of attainder, banishment, and confiscation, is essential to the existence and operations of government, yet, cannot be exercised by the ordinary tribunals of justice; it naturally belongs to the sovereign, that is, to the legislature of the nation. 5th. But, independent of the necessity of the existence of such a power, and of the implication that it does exist under every constitution, unless it is expressly excluded, a just analysis of the various clauses of the con-

1800. stitution itself, (which contemplates a trial by jury only in the case of an offence committed within a county of the state) the cotemporaneous construction of the legislature of *Georgia*, the corroborative example of other states, whose constitutions contain the same provisions, and even the authoritative recommendations of congress, with the recognitions of the treaty of peace; demonstrate the legitimacy and validity of the acts of attainder and confiscation, which naturally grew out of the revolutionary war. 6th. Attainder and confiscation acts are most common in *England*; yet, generally speaking, the judicial power and the legislative power, are there kept separate and distinct. *Blackstone*, *Woodeson*, *Montesquieu*, *De Lolme*. They are the exercise of a constitutional power of legislation: 2 *Wood.* 621. 647. And to exercise a power, not within the scope of the judicial authority, cannot be confounding the distinct branches of the government.

On the 13th of *February* 1800, the Judges (except the *Chief Justice*, who had decided the cause in the Circuit Court) delivered their opinions, *seriatim*, in substance as follows:

WASHINGTON, *Justice*. The constitution of *Georgia* does not expressly interdict the passing of an act of attainder and confiscation, by the authority of the legislature. Is such an act, then, so repugnant to any constitutional regulation, as to be excepted from the legislative jurisdiction, by a necessary implication? Where an offence is not committed within some county of the state, the constitution makes no provision for a trial, neither as to the place, nor as to the manner. Is such an offence (perhaps the most dangerous treason) to be considered as beyond the reach of the government, even to forfeit the property of the offender, within its territorial boundary? If the plaintiff in error had shown, that the offence, with which he was charged, had been committed in any county of *Georgia*, he might have raised the question of conflict and collision, between the constitution and the law: but as that fact does not appear, there is no ground on which I could be prepared to say, that the law is void. The presumption, indeed, must always be in favour of the validity of laws, if the contrary is not clearly demonstrated.

CHASE, *Justice*. I agree, for the reason which has been assigned, to affirm the judgment. Before the plaintiff in error could claim the benefit of a trial by jury, under the constitution, it was, at least, incumbent upon him to show, that the offence charged was committed in some county of *Georgia*, in which case alone the constitution provides for the trial. But even if he had established that fact, I should not have thought the law a violation of the constitution. The general principles contained in the constitution are not to be regarded as rules to fetter and controul; but as matter merely declaratory and directory: for, even in the constitution

stitution itself, we may trace repeated departures from the theoretical doctrine, that the legislative, executive, and judicial powers, should be kept separate and distinct. 1800.

There is, likewise, a material difference between laws passed by the individual states, during the revolution, and laws passed subsequent to the organization of the federal constitution. Few of the revolutionary acts would stand the rigorous test now applied: and although it is alleged that all acts of the legislature, in direct opposition to the prohibitions of the constitution, would be void; yet, it still remains a question, where the power resides to declare it void? It is, indeed, a general opinion, it is expressly admitted by all this bar, and some of the Judges have, individually, in the Circuits, decided, that the Supreme Court can declare an act of congress to be unconstitutional, and, therefore, invalid; but there is no adjudication of the Supreme Court itself upon the point. (1) I concur, however, in the general sentiment, with reference to the period, when the existing constitution came into operation; but whether the power, under the existing constitution, can be employed to invalidate laws previously enacted, is a very different question, turning upon very different principles; and with respect to which I abstain from giving an opinion; since, on other ground, I am satisfied with the correctness of the judgment of the Circuit Court.

PATERSON, *Justice*. I consider it as a sound political proposition, that wherever the legislative power of a government is *undefined*, it includes the judicial and executive attributes. The legislative power of *Georgia*, though it is in some respects restricted and qualified, is not defined by the constitution of the state. Had, then, the legislature power to punish its citizens, who had joined the enemy, and could not be punished by the ordinary course of law? It is denied, because it would be an exercise of judicial authority. But the power of confiscation and banishment does not belong to the judicial authority, whose process could not reach the offenders; and yet, it is a power, that grows out of the very nature of the social compact, which must reside somewhere, and which is so inherent in the legislature, that it cannot be divested, or transferred, without an express provision of the constitution.

The constitutions of several of the other states of the union, contain the same general principles and restrictions; but it never was imagined, that they applied to a case like the present; and to authorise this Court to pronounce any law void, it must be a clear and unequivocal breach of the constitution, not a doubtful and argumentative implication.

(1) The point has since been decided affirmativel by the Supreme Court in *Marbury* v. *Madison*, 1 *Cranch's Rep.* 137. See *Dall. Rep.*

CUSHING,

1800. CUSHING, *Justice.* Although I am of opinion, that this Court has the same power, that a Court of the state of *Georgia* would possess, to declare the law void, I do not think that the occasion would warrant an exercise of the power. The right to confiscate and banish, in the case of an offending citizen, must belong to every government. It is not within the judicial power, as created and regulated by the constitution of *Georgia*: and it naturally, as well as tacitly, belongs to the legislature.

By the COURT: Let the judgment be affirmed with costs.

Williamson, Plaintiff in Error, *versus* Kincaid.

ERROR from the Circuit Court of *Georgia.* It appeared from the record, that "*Marian Kincaid* of *Great Britain*, widow, "*demanded* against *John G. Williamson* the one third of 300 "acres of land, &c. in *Chatham* county, as dower. That the "tenant *pleaded*, 1st. The act of *Georgia* (passed the 1st of *March* "1778) attainting *G. Kincaid* (the demandant's late husband) "forfeiting his estate, and vesting it in *Georgia*, without office. "2d. The act of the 4th of *May* 1782, banishing *G. Kincaid*, and "confiscating his estate. 3d. The appropriation and sale of the "lands in question by virtue of the said attainder and confisca- "tion, before the 3d of *September* 1783 (the date of the definitive "treaty of peace) and before *G. Kincaid's* death. 4th. The alien- "age of the demandant (who was resident abroad on the 4th of "*July* 1776 and ever since) and therefore incapable of holding "lands in *Georgia*. That the demandant *replied*, that she and "her husband were inhabitants of *Georgia*, on the 19th of *April* "1775, then under the dominion of *Great Britain*; that her "husband continued a subject of *Great Britain* and never owed "allegiance to *Georgia*, nor was ever convicted by any lawful "authority of any crimes against the state. That the tenant "*demurred* to the replication, the demandant joined in demur- "rer, and *judgment* was pronounced by the Circuit Court (com- "posed of WASHINGTON, *Justice*, and CLAY, *District Judge*) "for the demandant." On this judgment the writ of error was brought, and the following errors assigned.

1. The general errors.

2. The attainder of *G. Kincaid* and the forfeiture and sale of his estate; so no right to dower accrued; and no land out of which it could be enjoyed.

3. The alienage of the widow on the 4th of *July* 1776 and ever since, by which she was incapable to take and hold real estate in *Georgia*.

The principal question (whether an alien, *British* subject, was entitled, under the treaty of peace, to claim and hold lands in dower)

dower) was not discussed, as the judgment was reversed, for want of a sufficient description of the parties to the suit, on the authority of *Bingham* v. *Cabot*, 3 *Dall.* 382. and *Turner* v. *The Bank of North-America*. *Ant.* But an important point of practice was previously settled, relative to the mode of ascertaining the value of the matter in dispute, in actions like the present. 1800.

For the plaintiff in error, it was admitted, in answer to an objection, that the value of the matter in dispute did not appear upon the record; but it was urged, that, from the nature of the subject, the demand of the plaintiff could not ascertain it; nor from the nature of the suit (like a case of ejectment, where damages are only given for the *ouster*) could it be fixed by the finding of a jury, on the judgment of the Court. 3 *Bl. Com.* 35, 6. As, therefore, there was no act of congress, nor any rule of the Court, prescribing a mode to ascertain, in such cases, the value in dispute, that the party may have the benefit of a writ of error, it was proposed to continue the cause, to afford an opportunity to satisfy the Court, by affidavits of the actual value of the property.

By the COURT: Be it so. Let the value of the matter in dispute be ascertained by affidavits, to be taken on ten days notice to the demandant, or her counsel in *Georgia*. But, consequently, the writ of error is not to be a *supersedeas*.

Ingersoll and *Dallas*, for the plaintiff in error.
E. Tilghman, for the defendant in error.

Blair *et al.* Plaintiffs in Error, *versus* Miller *et al.*

WRIT of error from the Circuit Court of *Virginia*. The judgment was rendered in the Circuit Court on the 28th of *May* 1799, and a writ of error issued returnable to *August* term 1799; but the record was not transmitted, nor the writ returned into the office of the clerk of the Supreme Court, till the 4th of *February* 1800. *Swift* objected to the acceptance and return of the record and writ: And,

By the COURT: The writ has become a nullity, because it was not returned at the proper term. It cannot, of course, be a legal instrument, to bring the record of the Circuit Court before us for revision. (1)

(1) See *post.* 22. *Course* v. *Stead et al.*

Rutherford

1800.

Rutherford *et al.* Plaintiffs in Error, *versus* Fisher *et al.*

ERROR from the Circuit Court of *New-Jersey*, sitting *in Equity*. It appeared, that the defendants in the Circuit Court had pleaded the statute of limitations to the bill of the complainants; and that the plea was over-ruled, and the defendants ordered to answer the bill. On this decree the present writ of error was sued out, and *Stockton* (of *New-Jersey*) moved to quash the writ, because it was not a *final decree*, upon which alone a writ of error would lie, 1 *vol.* 61, 62. *s.* 22. *E. Tilghman*, for the plaintiff in error, acknowledged the force of the words "final judgment," in the act of congress; and submitted the case without argument.

CHASE, *Justice*. In *England* a writ of error may be brought upon an interlocutory decree or order; and until a decision is obtained upon the writ, the proceedings in the Court below are stayed. But here the words of the act, which allow a writ of error, allow it only in the case of a final judgment.

By the COURT: The writ must be quashed with costs.

Blaine *versus* Ship Charles Carter *et al.*

THIS was an *appeal* from the Circuit Court of *Virginia*; and the preliminary question discussed was, whether such a process could be sustained? After argument,

The COURT decided, that the removal of suits, from the Circuit Court into the Supreme Court, must be by writ of error in every case, whatever may be the original nature of the suits.

Course *et al. versus* Stead *et Ux. et al.*

ERROR from the Circuit Court of the *Georgia* district, sitting *in Equity*. On the record it appeared, that upon the 5th of *May* 1795, an order had been made, in the case of *Stead et al. executors of Stead*, v. *Telfair et al.* the legal representatives of *Rae* and *Somerville* (1) "that 3634*l.* 14*s.* 7*d.* sterling, with in-"terest at 5 per cent. from the 1st of *January* 1774, to the 5th "of *May* 1795, deducting interest from the 19th of *April* 1775, "till the 3d of *September* 1783, be paid to the complainants "in that suit, with 5 per cent. on the amount of principal and in-

(1) The order was made when BLAIR, *Justice*, presided. The deduction of interest during the war, (this being a *British* debt) has not received the sanction of all the federal Judges. See 2 *Dall. Rep.* 104. *in note.*

terest,

" terest, for making the remittance to *Great Britain*. That the 1800.
" partnership property of *Rae* and *Somerville* admitted by the de-
" fendants to be in their hands, be first applied to the payment of
" the complainants. That the lands belonging to *J. Rae* or *J.*
" *Somerville*, deceased, referred to in the answers of the several
" defendants, and the title deeds of which they admitted to be in
" their possession, be sold by the marshal, and the proceeds be
" applied to satisfy the decree; the deeds to be deposited with
" the clerk in three months."

On the 15th of *November* 1796, a second order was made by consent (PATERSON, *Justice*, presiding) upon the report of the clerk, that, on the 4th of *January* 1796, there remained due to the complainants 11,196$\frac{77}{100}$ dollars, " that the partnership pro-
" perty of *Rae* and *Somerville*, in the hands of *Telfair* be sold, and
" the bonds, &c. delivered over under a general assignment. That
" if these assets are not sufficient to pay the debt, the remainder
" of *Somerville's* property be sold; and, after paying a prior
" judgment, shall be applied to the debt of the complainants.
" That a bond admitted by *W. Stephens*, one of the defendants,
" to be in his hands, given by *R. Whitfield* & Co. to *J. Rae*,
" senior, be delivered to the complainants. That certain negroes,
" in the custody of *S.* and *R. Hammond*, and *J. Habersham* be
" sold, and applied to the payment of the complainants' debt."

On the 2d of *May* 1797, *Elizabeth Course*, executrix of *Daniel Course*, was made a defendant, upon motion of the solicitor for the complainants; and on the 2d of *April* 1798 the supplemental bill was filed, which gave rise to the present writ of error, and on which a subpœna issued only against *Elizabeth Course*. This bill set forth the original bill of *Stead et al.* v. *Telfair et al.*; the orders and decrees, above stated; and the out standing balance on the 4th of *April* 1798, amounting to 8,479$\frac{58}{100}$ dollars. It then alleged " that *J. Rae*, senior, was seised, in his lifetime, of a
" tract of 450 acres of land, which was subject to the decree in
" favour of the complainants; and that *Elizabeth Course* held the
" said tract of land unjustly, and without title. And it concluded
" with praying a discovery of the title, and surrender of the pre-
" mises in satisfaction of the decree; and that the other defen-
" dants may disclose assets, &c."

On the 3d of April 1799, *Elizabeth Course* filed an answer to the supplemental bill, in which she set forth, " that she found
" among her late husband's papers, a deed of the 5th of *May* 1792,
" executed by *F. Courvoise*, tax collector of *Chatham* county to
" him, as purchaser at public auction, of the said tract of land, for
" 128*l.* 19*s.* 4*d.* for which a receipt was indorsed, and the deed
" recorded on the 24th of *October* 1792. That in virtue of the
" deed, possession was taken of the premises. That she believed
" the land came to *J. Rae*, by devise, or descent, from his father,
" was sold for non-payment of taxes, and was purchased, *bonâ*
fide

1800. "*fide*, by her late husband, whose title, in fee, is warranted by "the tax laws of the state; and as such is claimed by the defend- "ant for herself and children."

The cause was heard, upon the former decree of 1796, the supplemental bill and answer, before ELLSWORTH, *Chief Justice*, in *May* term 1799, when the COURT decreed, "that the pretended "conveyance be set aside, and held as void; and the land sold "to satisfy the debt of the complainants. Also, that certain ne- "groes in the possession of *William Stephens* and *Joseph Haber- "sham*, executors of *Samuel Elbert*, be sold and applied to the "same object, &c."

The errors assigned upon the record (which consisted of a recital of the two orders of Court, the supplemental bill and the proceedings on it, but not the original bill) were, in substance, the following:

1. It does not appear, that the partnership property was first applied to the payment of the claimants' debt, conformably to the decree of the 25th of *May* 1795: and, if so applied, it might have been sufficient.

2. The decree orders certain negroes in the possession of *Habersham* and *Stephens*, executors of *Elbert*, to be sold, whereas it was denied, that the negroes were in their hands, but it was admitted, that they were in the possession of the minor children of the said *Elbert*: and proof to the contrary was not made, nor were the children parties to the suit.

3. The negroes, presumed to be assets of *J. Rae*, are ordered to be sold, exclusively of property in the hands of the other defendants, without equality, or apportionment.

4. The facts stated in the answer are to be taken as true, since the complainants did not reply; and thence it appears, that the purchase of the land was *bonâ fide*, for a valuable consideration, under the sanction of a public officer, whose acts were annulled by the decree, without any evidence of fraud, or imposition.

5. The exhibits referred to in the supplemental bill (to wit the two orders of Court above-mentioned) were not filed with the bill, and were inadmissible as evidence.

6. That all the heirs, as well as the widow of *Daniel Course* should have been made parties, particularly the minors, who are under the peculiar protection of a Court of equity.

7. Real and personal estate are on the same footing, by the law of *Georgia*, equally under the management of executors, or administrators. And as there are other creditors to be affected by the decree, the legal representatives of *Daniel Course* should have been parties to the suit.

8. The facts, on which the decree was founded, do not appear on the record.

9. The Court had not power, under the circumstances of the case, to order the sale of real estate.

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Though this view of the record is given, for the sake of the points discussed and decided in the Circuit Court, the merits, on the errors assigned, were not discussed or decided in this Court; but the following points occurred. 1800.

I. *Ingersoll*, for the defendants in error, objected, that the writ of error was not tested as of the last day of the last term of the Supreme Court; nor, indeed, of that term at all; for, the Court had risen before the day of its teste.

Dallas observed, in answer, that there was no rule, either legislative, or judicial, prescribing the date of the teste of a writ of error; that in *Georgia* it might not be practicable, in many cases, to know the last day of the term of the Supreme Court, whose session was not limited; that if the writ is issued, in fact, after the preceding term, and returned, *sedente curia*, to the present term, it is regular; and that it is not like the case of a term intervening, between the teste of a writ of error, and the delivery of the record to the clerk of the Court. (2)

By the COURT: The objection is not sufficient to quash the writ of error. The teste may be amended by our own record of the duration of the last term; and it is, of course, amendable.

II. *Ingersoll* objected, that the writ of error was not directed to any Circuit Court; for, its address was "To the Judges of the Circuit Court, holden in and for *the district aforesaid:*" whereas no district was previously named.

Dallas, in reply, observed, that the district of *Georgia*, was indorsed on the writ, that the attestation of the record was in *Georgia*, and that the record returned was from the Circuit Court of the *Georgia* district.

By the COURT: The omission is merely clerical. We wish, indeed, that more attention were paid to the transcribing of records; but there is enough, in the present case, to amend by; and, therefore, let the omission be supplied.

III. *Ingersoll* objected, that the value of the matter in dispute does not appear upon the record, to be sufficient to sustain a writ of error. The land, which is the immediate subject of the supplemental bill, was sold for 128*l.* 19*s.* 4*d.* and that is the only criterion of its value exhibited to the Court.

Dallas. The value of the property in dispute, must be its actual value, for the purposes of jurisdiction. The price at a forced sale, for taxes, many years ago, cannot rationally be taken for the actual value of the land, with its meliorations. The Court will, therefore, permit the plaintiff in error to ascertain the fact by affidavits, on notice to the opposite party. It was so done in *Williamson* v. *Kincaid*.

(2) See *ante*, *Blair et al.* v. *Miller et al.*

1800. By the COURT: Let the rule be entered on the same terms, as in the case of *Williamson* v. *Kincaid*.

These preliminary objections to the writ being obviated, and the depositions being returned, to prove the value of the land (which was sufficient to sustain the writ of error), *Dallas* argued for a reversal of the decree of the Circuit Court on two grounds: (3) 1st. On the merits; and, 2d. On the want of a description of the parties, so as to give a federal jurisdiction.

1st. *On the merits.* The hearing on the bill and answer, operates as a tacit admission of the facts stated in the answer; which is not contradicted in any respect; and which establishes *Daniel Course's* purchase of the land in question, as a fair and valid transaction. *Hind. Pr. Ch.* 416, 7. 289. 441. The widow *Course* was not a party to the original bill; and cannot, therefore, be bound by the decree in that case. The defendants to the original bill are not parties to the supplemental bill; for, process is only prayed and issued against the widow. Yet, the decrees in the original suit are referred to as exhibits, though not filed, in the supplemental suit; and in the supplemental suit a decree is pronounced against the defendants in the original suit as well as against the widow, who is the sole defendant. Besides, the question is emphatically a question of assets to pay a debt, for which partnership property was first responsible; and the personal estates of the debtors before their real estates. Yet, no account is given of the partnership fund; and neither the minor heirs, nor other legal representatives of *Daniel Course*, are made parties to the suit, though their interest is expressly stated in the answer. *Hind. Pr. Ch.* 2. 8. 10. 420. 283, 4. *Mitf.* 39. 145.

2d. *On the want of description.* The only descriptive addition to the name of *Elizabeth Course*, throughout the record, is that she is the "widow of *Daniel Course*, deceased;" not stating that either he, or she, was a citizen of the state of *Georgia*. 3 *Dall.* 382. *Bingham* v. *Cabot*. 4 *Dall. Mossman* v. *Higginson. Turner* v. *The Bank of North America. Turner* v. *Enrille*. It would be extravagant to infer citizenship from mere residence, nor can it be successfully urged, that because the parties to the original bill (which, by the by, is not attached to the writ of error) were well described, this Court has jurisdiction on the supplemental bill, against a new party, not described, not pledged by any joint contract, and not connected in privity, or interest, with the defendants to the original bill. *Mitf.* 31.

Ingersoll, for the defendant in error, answered: 1*st. On the merits.* The decree of the Circuit Court was not pronounced simply

(3) The case was argued, on these grounds, at *Washington*, after the removal of the seat of government; but, with this intimation, it is though most convenient to continue the report under the term, in which it commenced.

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on the supplemental bill and answer; but on the decrees in the original suit, which liquidated and fixed the quantum of the debt; the conveyance to *Daniel Course*; and the tax laws of the state of *Georgia*. The conveyance was charged to be a fraudulent, pretended, deed, which was a matter of fact; 3 *Dall.* 321. and it was ascertained (not merely by the inadequate consideration, but) by reference to the tax laws, which did not authorise the sale at the time, when it took place, nor, at any time, if there were personal assets; and, consequently, the Court was bound to regard it as a nullity. (4) The objection, on the score of parties, cannot prevail, against the decree, that virtually finds the conveyance to be fraudulent; and, therefore, that no one claiming under it could derive a title, or interest, in the land. Besides, the widow *Course* is the tenant in possession of the premises, and the natural object of the supplemental bill; she must be presumed to have given notice to all proper persons; and, after all, if the objection has weight, it is sufficient to answer, that no one will be bound by the decree, to whom, on principles of law and equity, it does not extend. 1800.

2d. *On the want of description.* It is not necessary to describe the parties in the supplemental suit, which is merely an incident of the original bill, and must be brought in the same Court. The citizenship, however, of the plaintiff in error, does sufficiently appear, by reasonable presumption and necessary implication. It has never been decided, that the very term *citizens* and *aliens*, must be used in the description; but, if the description fairly imports, that one party to the suit is an alien, and the other party a citizen; or that the parties are citizens of different states; the Court will assert its jurisdiction. Then, the purchase and possession of real estate announce the character of citizen; since aliens cannot purchase and hold real estate in *Georgia*; and the long residence of *Daniel Course*, the purchaser, and his family, in the state, is a circumstance strongly corroborative. If the widow is sufficiently described, to show that she was a citizen of *Georgia*; there can be no doubt that the complainants are sufficiently described as aliens.

By the COURT: Having examined the record in the case of *Bingham* v. *Cabot*, we are satisfied, that the decision there, must govern upon the present occasion. It is, therefore, unnecessary to form, or to deliver any opinion upon the merits of the cause. Let the decree of the Circuit Court be reversed.

(4) When *Ingersoll* was about to read the statutes of *Georgia*, *Dallas* observed that they were not recited on the record; and that it might be a question, whether their existence ought not to have been established, as a fact, in the Court below. But the COURT said there could be no ground to refuse the reading of a law of any of the states. It appeared, however, that, on the point of time, *Ingersoll* referred to the statute for the tax of a different year, from that in which the sale was made.

SUPREME COURT

OF THE

UNITED STATES.

August Term 1800.

Present, PATERSON, CHASE, WASHINGTON, and MOORE, } Justices.

Priestman, Plaintiff in Error, *versus* The United States.

IN error from the Circuit Court, for the *Pennsylvania* district. An information was filed in the District Court in the following terms:

" *Be it remembered*, that on this 16th day of *January*, one " thousand seven hundred and ninety-eight, into the District " Court of the *United States* for the *Pennsylvania* district, in " his proper person comes *William Rawle* attorney for the said " *United States* for the district aforesaid, who for the said " *United States* in this behalf prosecutes and for the said *United* " *States* gives the court here to understand and be informed that " between the first day of *November* last past and the exhibition " of this bill two hundred and three silver watches, three gold " watches, two enamelled watches, two metal watches, two hunting watches, and seven pinchbeck watches, being articles of " foreign manufacture and liable to the payment of duties imposed by the laws of the *United States* and being together of " the value of eight hundred dollars and more were transported " from the state of *Maryland* across the state of *Delaware*, to " the district of *Pennsylvania* without a permit from the collector of any district in the said state of *Maryland*, for that purpose first had and obtained.

" And the attorney aforesaid prosecuting as aforesaid further " gives the Court to understand and be informed that the said " goods wares and merchandizes so as aforesaid transported to the

" the district of *Pennsylvania* were not within twenty-four hours 1800.
" after the arrival thereof in the said district of *Pennsylvania*
" reported to the collector of the said district of *Pennsylvania*
" by the owner or consignee thereof or by any other person
" whatever.

" Whereby and by force of the acts of the congress of the said
" *United States* the said 203 silver watches, 3 gold watches, 2
" enamelled watches, 2 metal watches, 2 hunting watches, and 7
" pinchbeck watches, have become forfeited to the said *United*
" *States* and for the causes aforesaid have been seized by *Sharp*
" *Delany*, esquire, collector of the said district of *Pennsylvania*,
" and are now in the custody of the marshal, &c. Wherefore the
" said attorney prosecuting as aforesaid prays the advice of the
" Court upon the premises, and due process, &c. &c."

This information was founded on the act of congress, entitled " An act for enrolling and licensing ships, or vessels, to be em-
" ployed in the coasting trade and fisheries, and for regulating
" the same;" 2 *vol.* 168. and, particularly, upon the 19th section of the act, which is in these words:

" Sec. 19. *And be it further enacted*, That it shall and may
" be lawful for the collector of the district of *Pennsylvania*, to
" grant permits for the transportation of goods, wares or mer-
" chandize of foreign growth or manufacture, across the state of
" *New-Jersey*, to the district of *New-York*, or across the state of
" *Delaware*, to any district in the state of *Maryland* or *Virginia*;
" and for the collector of the district of *New-York*, to grant like
" permits for the transportation across the state of *New-Jersey*;
" and for the collector of any district of *Maryland* or *Virginia*, to
" grant like permits for the transportation across the state of *Dela-*
" *ware*, to the district of *Pennsylvania*: *Provided*, That every such
" permit shall express the name of the owner, or person sending
" such goods, and of the person or persons, to whom such goods
" shall be consigned, with the marks, numbers and description of the
" packages, whether bale, box, chest, or otherwise, and the kind
" of goods contained therein, and the date, when granted; and
" the owner or person sending such goods, shall swear or affirm,
" that they were legally imported, and the duties thereupon paid
" or secured: *And provided also*, That the owner or consignee of
" all such goods, wares and merchandize, shall, within twenty-
" four hours after the arrival thereof, at the place to which they
" were permitted to be transported, report the same, to the col-
" lector of the district where they shall so arrive, and shall deli-
" ver up the permit accompanying the same, and if the owner or
" consignee aforesaid, shall neglect or refuse to make due entry
" of such goods within the time, and in the manner, herein di-
" rected, all such goods, wares and merchandize shall be subject
" to forfeiture; and if the permit granted shall not be given up,

" within

1800. "within the time limited for making the said report, the person "or persons to whom it was granted, neglecting or refusing to "deliver it up, shall forfeit fifty dollars for every twenty-four "hours it shall be withheld afterwards: *Provided*, That where "the goods, wares and merchandize, to be transported in manner "aforesaid, shall be of less value than eight hundred dollars, the "said oath and permit shall not be deemed necessary, nor shall "the owner or consignee be obliged to make report to the col- "lector of the district where the said goods, wares and merchan- "dize shall arrive."

William Priestman, the plaintiff in error, filed a claim for the watches, setting forth "that he had paid the duties upon them, and that he did not transport them from the district of *Maryland*, across the state of *Delaware*, into the district of *Pennsylvania*." The attorney of the district having filed a general replication to the claim, a case was made for the opinion of the Court, in which the material facts were stated, as follows:

"That the watches in question were of the value of 3,899 "dollars. That they were imported into the district of *Maryland*, "and the duties thereon paid, or secured, according to law. That "they were afterwards carried by the claimant, or his agent, "from the district of *Maryland*, across the state of *Delaware*, "to the state of *Pennsylvania*, to wit, to the city of *Philadelphia*, "without any licence, or permit, so to do, first had and obtained "from the collector of the port of *Baltimore*; and that no notice "was given to the collector of the port of *Philadelphia*. That the "watches were publicly offered for sale, next door to the custom- "house, in the city of *Philadelphia* with a number of other arti- "cles; and were afterwards seized as forfeited. That the watches "did not belong to the master, owner, or any mariner of the ship, "or vessel, in which they were imported from beyond sea into "*Baltimore*; nor was the claimant captain, owner, or mariner, of "the packet-boat, in which they were brought from *Baltimore* to "*French-town*, or from *Newcastle* to *Philadelphia*."

The case was argued before the District Judge, in *December* 1798, and a decree of condemnation pronounced; which was affirmed upon a writ of error to the Circuit Court, in *April* term 1800;(1) and, thereupon, the cause was removed into this Court; and

(1) The Circuit Court was composed of CHASE, *Justice*, and PETERS, *District Judge*. The presiding Judge, in delivering the opinion of the Court, made the following observations:

CHASE, *Justice*. By the rules, which are laid down in *England* for the construction of statutes, and the latitude which has been indulged in their application, the *British* Judges have assumed a legislative power; and on the pretence of judicial exposition, have, in fact, made a great portion of the statute law of the kingdom. Of those rules of construction, none can be more dangerous, than that, which distinguishing between the intent, and the words, of the

and argued, upon the same facts, by the district attorney, (*Rawle*, in the absence of *Lee*, attorney-general) for the *United States*, assisted by *W. Sergeant*, for the informer; and by *Ingersoll* and *S. Levy*, for the plaintiff in error. 1800.

For the plaintiff in error. This is a penal act, and must, on general principles, be construed strictly. 1 *Black. Com.* 88. 92. *Plowd.* 109. 3 *Co.* 7. *Plowd.* 13. *b.* 19 *Vin. Abr.* 523, 4. 8 *Mod.* 7. 65. 10 *Co.* 73. *Cowp.* 355. 660. In the particular case, before the Court, the facts call for the most liberal exposition in favour of the claimant; since, there is not the slightest ground to impute a fraudulent intention to him; nor could there be the smallest loss of revenue to the public. Taking, then, the 33d section of the same act of congress into view, to form a just conclusion from the whole, the watches in question are exempted from any forfeiture, because they did not belong to the master, owner, or mariners, of the vessel, in which they were imported, and because the duties upon them had been previously paid, or secured. (2) It must, indeed, be admitted, that there is an apparent contradiction between the 19th section, which imposes the forfeiture, if *the owner*, or consignee of the goods, neglects to perform the duties prescribed; and the 33d section, which exempts the goods from forfeiture, if they belong to any person, other than the owner, master, or mariners, of the vessel: but the different parts of statutes should be so construed, that each, if possible, may have an operation, consistent and harmonious with the rest. Admitting, therefore, that the claimant is within the

the legislature, declares, that a case not within the meaning of a statute, according to the opinion of the Judges, shall not be embraced in the operation of the statute, although it is clearly within the words: or, *vice versa*, that a case within the meaning, though not within the words, shall be embraced.

For my part, however, sitting in an *American* Court, I shall always deem it a duty to conform to the expressions of the legislature, to the letter of the statute, when free from ambiguity and doubt; without indulging a speculation, either upon the impolicy, or the hardship, of the law. In the present instance, the clause of forfeiture is clear, direct, and positive. If the provision of the 33d section were equally clear, and necessarily connected with the subject of the 19th section, it would, undoubtedly, control the clause of forfeiture. But say even, that the 33d section is obscure in its terms, and doubtful in its relation (which I do not admit) this would not induce me to supersede, control, and annul, what is neither obscure, nor doubtful, in the provisions of the 19th section.

Upon the whole, the effect, in the present case, will, probably, be severe upon the claimant, if he has only been guilty of an act of negligence: but the law does not distinguish, as to the present object, between a careless, and a fraudulent, omission of the duty prescribed, and the Court cannot do it.

(2) Sec. 33. "*Provided nevertheless, and be it further enacted*, That in all "cases where the whole, or any part, of the lading, or cargo, on board any "ship, or vessel, shall belong *bonâ fide* to any person, or persons, other than "the master, owner, or mariners, of such ship, or vessel, and upon which the "duties shall have been previously paid, or secured, according to law, shall "be exempted from any forfeiture under this act, any thing herein contained "to the contrary notwithstanding."

description

1800. description of the 19th section, to incur a forfeiture, the apparent contradiction of the law will be obviated, by admitting, also, that the previous payment of the duties on the goods, exempts him from the forfeiture, under the 33d section. Besides, the information does not state, that the master of the vessel had no manifest; and to constitute the offence the act of irregular transportation must be connected with the want of a manifest, conformably to the 18th section. The 19th section (and, indeed, the whole of the law, which is made emphatically to regulate *the coasting trade*) from the plain import of its language, applies to cases of water carriage, and cases of water carriage are equally the subject of the 33d section. Nor is there any thing in the case stated to show that the watches were not transported coast-wise; or brought in the owner's private carriage; and even the 19th section does not contain an injunction upon *the owner* to take out *a permit* for his goods, on which he has paid the duties, to whatever place he may chuse to remove them.

For the United States. Though penal laws are to be strictly construed, they are to be fairly and truly construed, according to the plain and natural signification of the words employed. 2 *Ld. Raym.* 1421. 1 *Dall. Rep.* 197. 10 *Co.* 73. If, however, the claimant's construction should prevail, the sweeping operation of the 33d section of the act would annihilate its most positive and most salutary sanctions: but a proviso, so repugnant to the enacting clauses, would itself be void. 1 *Bl. Com.* 1 *Co. Rep.* 47. *a.* The case stated brings the facts precisely within the information; and the information is precisely within the 19th section. The forfeiture is, therefore, complete, and must be enforced by the Court, unless it is remitted by the operation of the 33d section. It becomes important, then, to inquire, 1st. What is the true meaning of this ambiguous, and, certainly, ungrammatical clause? and, 2d. To what does the true meaning relate?

1st. The first difficulty that occurs, in settling the meaning of the 33d section, arises from the indefinite call for a noun, to correspond with the verb, where several nouns are introduced, and all cannot be applied. Is it the *ship*, the *master*, or the *cargo*, which, in the specified case, "*shall* be exempted from any forfeiture?" The marginal note declares the exemption in favour of the *ship;* but the argument of the claimant, asks it for the *cargo.* The 33d section, however, is, in form and substance, *a proviso;* and, as such, naturally refers to the next preceding section, where are to be found the offences, from which the forfeiture springs, and the subject on which the forfeiture attaches; *s.* 32. to wit: 1st. The transfer of a licensed ship to an alien. 2d. The employment of a licensed vessel in a trade not licensed. 3d. The possession of a forged, or altered, licence. 4th. The possession of a licence granted for another ship. In the *four* cases, the ship and the cargo

cargo on board, are declared to be the subject of forfeiture. 1800.
But the exemption from forfeiture, contained in the 33d section, is not, in the generality of the expression, confined to the four cases; but extends to "any forfeiture under this act, any thing "therein contained to the contrary notwithstanding." Must not *the nature* of the offence be considered, then, to qualify the generality of the expression? In the 5th section it is enacted, that if a vessel is found with a forged, or altered, licence; or makes use of a licence granted for another vessel, the offending vessel, and the cargo on board, shall be forfeited. In the 6th section it is enacted, that if a vessel is found in the coasting trade, or carrying on the fisheries, without being enrolled and licensed, and having a foreign cargo, or distilled spirits, on board, she and her lading shall be forfeited. In the 8th section it is enacted, that if an enrolled, or licensed, vessel sails on a foreign voyage without first surrendering her licence, and taking out a register, she and her cargo shall be forfeited. And in the 21st section it is enacted, that if a vessel licensed for the fisheries, is found within three leagues of the coast, with foreign merchandize on board, exceeding in value 500 dollars, she and her cargo shall be forfeited, unless she had previously obtained permission to touch at a foreign port. Now, in all these sections the forfeiture of the cargo is accumulative, derivative, and accessary, to the forfeiture of the vessel; and the punishment is inflicted for offences committed by the master, or owner, of the vessel. Hence, the policy and justice of the provison of the 33d section, in contemplation of such cases, to prevent one man's suffering for another man's wrong, by exempting from forfeiture, the cargo on board the delinquent vessel, to whose owners, master, or mariners, the cargo did not belong. With reference, therefore, to the nature of the offences, enumerated in the next preceding section, the exemption from "any forfeiture under this act," must be confined to forfeitures of the same kind; that is, to forfeitures of vessels and their cargoes, for the acts, or omissions, of the owners, or masters, of the vessels. But, still, there are specific and appropriate forfeitures, arising from the misconduct of the owners of goods. Thus, if the owner of goods transport them, *by water*, from district to district, they must be accompanied with a manifest, or they will be liable to forfeiture, under the 18th section. And, if he transport them *by land*, he must obtain a permit, under the same penalty, in compliance with the 19th section. The same principle, which suggested the necessity of a manifest in the one case, required the permit in the other; and if the goods are not included in the manifest, or, of course, if not included in the permit, they are forfeited. It is idle to argue from the supposed inutility of requiring the permit. It is an incident in a general system, that must be maintained in all its parts; for, at the slightest aperture, the most inconvenient mischiefs may enter.

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2d. In answering the second general inquiry (to what does the true meaning of the 33d section refer?) it is proper more particularly to observe, that the 19th section clearly provides for the case of a transportation *by land carriage;* because it speaks of a transportation "*across a state*," which (as no canal is established) must be by land. If by land, it cannot involve the agency of a ship, or vessel; and as the proviso of the 33d section refers to the forfeiture of a ship, or vessel, and not of a waggon, or stage, as it does not describe *goods*, generally, but *a lading, or cargo, on board*, it is utterly inapplicable to a case of internal land carriage; and must be considered as referring only to cases of water transportation; or, in other words, to the coasting trade.

On the 15th of *August*, the Judges briefly delivered their opinions, *seriatim*, concurring in the following result.

By the COURT: The case stated comes clearly within the 19th section of the act of congress, for enrolling and licensing vessels to be employed in the coasting trade and fisheries. The provisions of the section are salutary, and were made to guard against frauds upon the revenue, in the transportation of goods, of foreign growth, or manufacture, across the several states. Public policy, national purposes, and the regular operations of government, require, that the revenue system should be faithfully observed, and strictly executed. It is obvious that the claimant is an offender within the purview of the 19th section. To purge the offence, he relies upon the 33d section of the same act. But it is too plain for argument, that this section cannot, by any fair and rational construction, be made to refer to the 19th section. It is inapplicable, because the objects are entirely different.

Judgment affirmed.

Talbot *versus* The Ship Amelia, Seeman, Claimant.

ERROR from the Circuit Court of *New York*. It appeared on the record, that Capt. *Talbot*, of the frigate *Constitution*, having re-captured the *Amelia*, an armed *Hamburgh* vessel, which had been captured by a *French* national corvette, and ordered to *St. Domingo*, for adjudication, brought her into the port of *New-York*. A libel was thereupon filed in the District Court by the re-captor, setting forth the facts, and praying that the vessel and cargo might be condemned as prize; or that such other decree might be pronounced as the Court should deem just and proper. A claim was filed by *H. F. Seeman*, for *Chapeau Rouge* & Co. of *Hamburgh*, the owners, insisting that the property had not been changed by the capture, and praying restitution with damages and costs. The *District Judge*, HOBART, decreed one-half of the gross amount of sales of ship and cargo, without

without deduction, (a sale having been made by consent) to be paid to the re-captors, in the proportions directed by the act of congress for the government of the navy; and the other half, deducting all costs and charges, to be paid to the claimants. The cause was brought by appeal before the Circuit Court, WASHINGTON, *Justice*, presiding, who reversed the decree of the District Court, so far as it ordered payment of one half of the gross sales to the re-captors, "considering that as the nation to which "the owners of the said ship and cargo belong, is in amity with "the *French* republic, the ship and cargo could not, consistently "with the laws of nations, be condemned by the *French* as a "lawful prize; and that, therefore, no service was rendered by "the *Constitution*, or by the commander, officers, or crew there-"of, by the re-capture aforesaid;" and affirmed the rest of the decree. On the decree of the Circuit Court the present writ of error was instituted; and the following statement of facts made a part of the record by consent, 1800.

"The following case is agreed upon by the parties, to be an-"nexed to the writ of error in this cause, viz.

"The ship *Amelia* sailed from *Calcutta*, in *Bengal*, in the "month of *April* 1799, loaded with a cargo of the produce and "manufactory of that country, consisting of cotton, sugars, and "dry goods, in bales, and was bound to *Hamburgh*.

"On the sixth of *September* in the same year the same was "captured, whilst in the pursuit of her said voyage, by the *French* "national corvette *La Diligente*, *L. I. Dubois*, commander, who "took out her captain and part of her crew, together with most "of her papers, and placed a prize master and *French* sailors on "board of her, ordering the prize master to conduct her to *St.* "*Domingo*, to be judged according to the laws of war. On the "fifteenth of the same month of *September*, the *United States* "ship of war, the *Constitution*, commanded by *Silas Talbot*, "Esquire, the libellant, fell in with, and re-captured, the *Amelia*, "she being then in full possession of the *French*, and pursuing "her course for *St. Domingo*, according to the orders received "from the captain of the *French* corvette.

"At the time of the re-capture, the *Amelia* had eight iron "cannon mounted, and eight wooden guns, with which she had "left *Calcutta*, as before stated.

"From such of the ship's papers as were found on board, and "the testimony in the cause, the ship *Amelia*, and her cargo, "appear to have been the property of *Chapeau Rouge*, a citi-"zen of *Hamburgh*, residing, and carrying on commerce, in "that place. It is conceded that the republic of *France* and the "city of *Hamburgh* are not in a state of hostility to each other, "and that *Hamburgh* is to be considered as neutral between the "present belligerent powers.

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1800. "The *Amelia* and her cargo, having been sent by captain *Talbot* to *New-York*, were there libelled in the District Court, and "such proceedings were thereupon had in that Court, and the "Circuit Court for that district, as may appear by the writ of "error and return.

"*Alexander Hamilton*, of counsel for plaintiff in error.
"*B. Livingston*, of counsel for defendant in error."

The cause was argued on the 11th, 12th, and 13th of *August* 1800, by *Ingersoll* and *Lewis*, for the plaintiff in error; and by *M. Levy* and *Dallas*, for the defendant in error. The general points of the discussion were these:

1st. Whether the *Amelia* could be considered, at the time of the re-capture, as *a French armed vessel*, within the meaning of the act of congress, which authorises the seizure of *French* armed vessels? 4 *vol. p.*

2d. Whether captain *Talbot* was authorised to make a *re-capture*, the *Amelia* belonging to a power, equally in amity with the *United States*, and with *France*?

3d. Whether, on positive statute, or general principles, a salvage was due to the re-captors, for rescuing the *Amelia* from the *French*?

On the 18th of *August*, PATERSON, *Justice*, stated, that it was the wish of the COURT to postpone the cause for further argument, before a fuller bench. It was, accordingly, argued again at *Washington*, in *August* term 1801, by *Ingersoll* and *Bayard* (of *Delaware*) for the plaintiff in error; and by *M. Levy*, *J. T. Mason* (of *Maryland*) and *Dallas* for the defendant in error. And MARSHALL, *Chief Justice*, delivered the judgment of the Court, "that the decree of the Circuit Court was correct, in reversing "the decree of the District Court, but not correct in decreeing "the restoration of the *Amelia*, without paying salvage. This "Court, therefore, is of opinion, that the decree, so far as the "restoration of the *Amelia* without salvage is ordered, ought to "be reversed: and that the *Amelia* and her cargo ought to be "restored to the claimant, on paying for salvage one-sixth part "of the net value, after deducting therefrom the charges, which "have been incurred." (1)

(1) A full report of the arguments, on the first hearing of this cause, was prepared; but they are found so ably incorporated with the arguments on the second hearing, in Mr. *Cranch's* Reports, that it has been thought unnecessary to publish it in this volume. 1 *Cranch. Rep.* 1.

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Bas, Plaintiff in Error, *versus* Tingy, Defendant in Error. 1800.

IN error from the Circuit Court for the district of *Pennsylvania*. On the return of the record it appeared, by a case stated, that the defendant, in error, had filed a libel in the District Court, as commander of the public armed ship the *Ganges*, for himself and others against the ship *Eliza*, *John Bas*, *master*, her cargo, &c. in which he set forth that the said ship and cargo belonged to citizens of the *United States*; that they were taken on the high seas by a *French* privateer, on the 31st of *March*, 1799; and that they were re-taken by the libellant, on the 21st of *April* following, after having been above ninety-six hours in possession of the captors. The libel prayed for salvage conformably to the acts of congress; and the facts being admitted by the answer of the respondents, the District Court decreed to the libellants one half of the whole value of ship and cargo. This decree was affirmed in the Circuit Court without argument, and by consent of the parties, in order to expedite a final decision on the present writ of error.

The controversy involved a consideration of the following sections in two acts of congress: By an act of the 28th of *June* 1798, (4 *vol. p.* 154. *s.* 2.) it is declared, "That whenever any vessel the property of, or employed by, any citizen of the *United States*, or person resident therein, or any goods or effects belonging to any such citizen, or resident, shall be re-captured by any public armed vessel of the *United States*, the same shall be restored to the former owner, or owners, upon due proof, he or they paying and allowing, as and for salvage to the re-captors, one-eighth part of the value of such vessel, goods and effects, free from all deduction and expenses."

By an act of the 2d of *March*, 1799 (4 *vol. p.* 472) it is declared, "That for the ships or goods belonging to the citizens of the *United States*, or to the citizens, or subjects, of any nation in amity with the *United States*, if re-taken from *the enemy* within twenty-four hours, the owners are to allow one-eighth part of the whole value for salvage, &c. and if above ninety-six hours one-half, all of which is to be paid without any deduction whatsoever, &c. And, by the 9th section of the same act it is declared, "That all the money accruing, *or which has already accrued from the sale of prizes*, shall be and remain forever a fund for the payment of the half-pay to the officers and seamen, who may be entitled to receive the same."

The case was argued by *Lewis*, and *E. Tilghman*, for the plaintiff in error, and by *Rawle*, and *W. Tilghman*, for the defendant; and the argument turned, principally, upon two inquiries: 1st. Whether the act of *March* 1799, applied only to the event of a future general war? 2d. Whether France was *an enemy* of the *United States*, within the meaning of the law?

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For the plaintiff in error, it was urged, that the acts, passed in immediate relation to France, were of a restricted, temporary, nature; but that the act of *March* 1799 established a permanent system for the government of the navy; and the designation of "the enemy" in that act, applies only to future hostilities, in case of a declared war. That on the just principles of government, every citizen has a right to the public protection; and, therefore, no salvage ought, in strictness, to be allowed for the re-capture of the property of a citizen by a public ship of war. *Vatt. b.* 2. *c.* 6. *s.* 71. And congress has manifested, in some degree, their sense on the subject, by making the salvage in that case less, then in the case of re-capture by a private armed vessel. That the word "*enemy*," must be construed according to its legal import; 1 *Stra.* 278. and that according to legal interpretation, the differences between the *United States* and *France*, do not constitute *war*, nor render the citizens of *France enemies* of the *United States*. *Vatt. b.* 3. *s.* 69, 70. 1 *Black. Com.* 257. 2 *Black. Com.* 259. 2 *Burl.* 258. *s.* 31. 261. *s.* 39. 262. That a subsequent law does not abrogate a prior law, unless it contains contradictory matter; and where there are no negative, or repealing, words, both must be so construed as to stand together. 11 *Co.* 61. 63. *Show.* 439. 10 *Mod.* 118. 6 *Co.* 19. *b.* That the act of *March* 1799, contains no repealing, or negative, words; and may be applied, consistently, to the case of a future public war, leaving the qualified state of hostility with *France*, for the operation of the preceding law.

For the defendant in error, it was contended, that the relative situation of the *United States* and *France*, is that of "a qualified maritime war;" on the part of the *French* aggressive; on our part, defensive; proceeding from a legitimate expression of the public will, through its constitutional organ, the congress, manifested by public declarations, and open acts. That from such a state, the character of *enemy* necessarily arises; and that the designation being so understood by congress, was intended to be applied, and was actually applied, to *France*. That the act of *March* 1799 speaks of prizes, which could only be such as had been captured from *France*; and that taking the word *prize*, according to its legal signification, it means a capture, or acquisition, by right of war, in a state of war. 3 *Bl. Com.* 69. 108. 2 *Wood.* 441. *Doug.* 585. 591. *Rob. Adm. Rep.* 283. That if a prize means a capture in war, it follows, of course, that it means a capture from an enemy; for, war can only be waged against enemies. That war may exist without a declaration; a defensive war requires no declaration; and an imperfect, or qualified, public war, is still distinct from the case of letters of marque and reprisal, for the redress of a private wrong, by the employment of a private force. 1 *Ruth. b.* 1. *c.* 19. *s.* 1. *p.* 470, 1. 2 *Ruth.* 497, 8. 503. 507. 511. *Burl.* 196. 189. *Vatt.* 475. 2 *Burl.* 204. *s.* 7. *Lee on Capt.* 13—39. *Puff.* 843. *Grot. b.* 3. *c.* 3. *s.* 6. *Molloy* 46. That congress,

gress, by repealing the regulations respecting salvage, contained in the act of *March* 1798, has virtually declared, that those regulations were in force, in relation to *France*; and that the provisions, in the act of *March* 1799, being inconsistent with the provision in the act of *June* 1798, the elder law is so far repealed. (1) 1800.

The JUDGES delivered their opinions *seriatim* in the following manner:

MOORE, *Justice*. This case depends on the construction of the act, for the regulation of the navy. It is objected, indeed, that the act applies only to future wars; but its provisions are obviously applicable to the present situation of things, and there is nothing to prevent an immediate commencement of its operation.

It is, however, more particularly urged, that the word "*enemy*" cannot be applied to the *French*; because the section in which it is used, is confined to such a state of war, as would authorise a re-capture of property belonging to a nation *in amity* with the *United States*, and such a state of war, it is said, does not exist between *America* and *France*. A number of books have been cited to furnish a glossary on the word *enemy*; yet, our situation is so extraordinary, that I doubt whether a parallel case can be traced in the history of nations. But, if words are the representatives of ideas, let me ask, by what other word the idea of the relative situation of *America* and *France* could be communicated, than by that of *hostility*, or *war?* And how can the characters of the parties engaged in hostility or war, be otherwise described than by the denomination of *enemies?* It is for the honour and dignity of both nations, therefore, that they should be called *enemies;* for, it is by that description alone, that either could justify or excuse, the scene of bloodshed, depredation and confiscation, which has unhappily occurred; and, surely, congress could only employ the language of the act of *June* 13, 1798, towards a nation whom she considered as an enemy.

Nor does it follow, that the act of *March* 1799, is to have no operation, because all the cases in which it might operate, are not in existence at the time of passing it. During the present hostilities, it affects the case of re-captured property belonging to our own citizens, and in the event of a future war it might also be applied to the case of re-captured property belonging to a nation in amity with the *United States*. But it is further to be remarked, that all the expressions of the act may be satisfied, even at this very time: for by former laws the re-capture of property, belonging to persons resident within the *United States* is authorised; those residents may be aliens; and, if they are subjects of a nation in amity with the *United States*, they answer completely the description of the law.

(1) All the acts of congress, passed in relation to *France*, were cited and discussed by both sides in the course of the argument; but it is thought unnecessary to refer to them more particularly in this report.

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1800. The only remaining objection, offered on behalf of the plaintiff in error, supposes, that, because there are no repealing or negative words, the last law must be confined to future cases, in order to have a subject for the first law to regulate. But if two laws are inconsistent, (as, in my judgment, the laws in question are) the latter is a virtual repeal of the former, without any express declaration on the subject.

On these grounds, I am clearly of opinion, that the decree of the Circuit Court ought to be affirmed.

WASHINGTON, *Justice*. It is admitted, on all hands, that the defendant in error is entitled to some compensation; but the plaintiff in error contends, that the compensation should be regulated by the act of the 28th *June* 1798, (4 *vol. p.* 154. *s.* 2.) which allows only one-eighth for salvage; while the defendant in error refers his claim to the act of the 2d *March*, (*ibid.* 456. *s.* 7.) which makes an allowance of one-half, upon a re-capture from *the enemy*, after an adverse possession of ninety-six hours.

If the defendant's claim is well founded, it follows, that the latter law must virtually have worked a repeal of the former; but this has been denied, for a variety of reasons:

1st. Because the former law relates to re-captures from *the French*, and the latter law relates to re-captures from *the enemy;* and, it is said, that "*the enemy*" is not descriptive of *France*, or of her armed vessels, according to the correct and technical understanding of the word.

The decision of this question must depend upon another; which is, whether, at the time of passing the act of congress of the 2d of *March* 1799, there subsisted a state of war between the two nations? It may, I believe, be safely laid down, that every contention by force between two nations, in external matters, under the authority of their respective governments, is not only war, but public war. If it be declared in form, it is called *solemn*, and is of the perfect kind; because one whole nation is at war with another whole nation; and *all* the members of the nation declaring war, are authorised to commit hostilities against all the members of the other, in every place, and under every circumstance. In such a war all the members act under a general authority, and all the rights and consequences of war attach to their condition.

But hostilities may subsist between two nations more confined in its nature and extent; being limited as to places, persons, and things; and this is more properly termed *imperfect war;* because not solemn, and because those who are authorised to commit hostilities, act under special authority, and can go no farther than to the extent of their commission. Still, however, it is *public war*, because it is an external contention by force, between some of the members of the two nations, authorised by the legitimate powers. It is a war between the two nations, though all the members

members are not authorised to commit hostilities such as in a solemn war, where the government restrain the general power. 1800.

Now, if this be the true definition of war, let us see what was the situation of the *United States* in relation to *France*. In *March* 1799, congress had raised an army; stopped all intercourse with *France*; dissolved our treaty; built and equipt ships of war; and commissioned private armed ships; enjoining the former, and authorising the latter, to defend themselves against the armed ships of *France*, to attack them on the high seas, to subdue and take them as prize, and to re-capture armed vessels found in their possession. Here, then, let me ask, what were the technical characters of an *American* and *French* armed vessel, combating on the high seas, with a view the one to subdue the other, and to make prize of his property? They certainly were not friends, because there was a contention by force; nor were they private enemies, because the contention was external, and authorised by the legitimate authority of the two governments. If they were not our enemies, I know not what constitutes an enemy.

2d. But, secondly, it is said, that a war of the imperfect kind, is more properly called acts of hostility, or reprizal, and that congress did not mean to consider the hostility subsisting between *France* and the *United States*, as constituting a state of war.

In support of this position, it has been observed, that in no law prior to *March* 1799, is *France* styled our enemy, nor are we said to be at war. This is true; but neither of these things were necessary to be done: because as to *France*, she was sufficiently described by the title of the *French* republic; and as to *America*, the degree of hostility meant to be carried on, was sufficiently described without declaring war, or declaring that we were at war. Such a declaration by congress, might have constituted a perfect state of war, which was not intended by the government.

3d. It has, likewise, been said, that the 7th section of the act of *March* 1799, embraces cases which, according to pre-existing laws, could not then take place, because no authority had been given to re-capture friendly vessels from the *French*; and this argument was strongly and forcibly pressed.

But, because every case provided for by this law was not then existing, it does not follow, that the law should not operate upon such as did exist, and upon the rest whenever they should arise. It is a permanent law, embracing a variety of subjects, not made in relation to the present war with *France* only, but in relation to any future war with her, or with any other nation. It might then very properly allow salvage for re-capturing of *American* vessels from *France*, which had previously been authorised by law, though it could not immediately apply to the vessels of friends: and whenever such a war should exist between the *United States* and *France*, or any other nation, as according to the law of nations,

1800. or special authority, would justify the re-capture of friendly vessels, it might on that event, with similar propriety, apply to them; which furnishes, I think, the true construction of the act.

The opinion which I delivered at *New-York*, in *Talbot* v. *Seaman*, was, that although an *American* vessel could not justify the re-taking of a neutral vessel from the *French*, because neither the sort of war that subsisted, nor the special commission under which the *American* acted, authorised the proceeding; yet, that the 7th sect. of the act of 1799, applied to re-captures from *France as an enemy*, in all cases authorised by congress. And on both points, my opinion remains unshaken; or rather has been confirmed by the very able discussion which the subject has lately undergone in this Court, on the appeal from my decree. Another reason has been assigned by the defendant's counsel, why the former law is not to be regarded as repealed by the latter, to wit: that a subsequent affirmative general law cannot repeal a former affirmative special law, if both may stand together. This ground is not taken, because such an effect involves an indecent censure upon the legislature for passing contradictory laws, since the censure only applies where the contradiction appears in the same law; and it does not follow, that a provision which is proper at one time may not be improper at another, when circumstances are changed: but the ground of argument is, that a change ought not to be presumed. Yet, if there is sufficient evidence of such a change in the legislative will, and the two laws are in collision, we are forced to presume it.

What then is the evidence of legislative will? In fact and in law we are at war: an *American* vessel fighting with a *French* vessel, to subdue and make her prize, is fighting with an enemy accurately and technically speaking: and if this be not sufficient evidence of the legislative mind, it is explained in the same law. The sixth and the ninth sections of the act speak of *prizes*, which can only be of property taken at sea from *an enemy*, *jure belli;* and the 9th section speaks of prizes as taken from *an enemy*, in so many words, alluding to prizes which had been previously taken: but no prize could have been then taken except *from France*: prizes taken from *France* were, therefore, taken from *the enemy*. This then is a legislative interpretation of the word enemy; and if the enemy as to prizes, surely they preserve the same character as to re-captures. Besides, it may be fairly asked, why should the rate of salvage be different in such a war as the present, from the salvage in a war more solemn or general? And it must be recollected, that the occasion of making the law of *March* 1799, was not only to raise the salvage, but to apportion it to the hazard in which the property re-taken was placed; a circumstance for which the former salvage law had not provided.

The two laws, upon the whole, cannot be rendered consistent, unless the Court could wink so hard as not to see and know, that in

in fact, in the view of congress, and to every intent and purpose, the possession by a *French* armed vessel of an *American* vessel, was the possession of an *enemy:* and, therefore, in my opinion, the decree of the Circuit Court ought to be affirmed. 1800.

CHASE, *Justice.* The Judges agreeing unanimously in their opinion, I presumed that the sense of the Court would have been delivered by the president; and therefore, I have not prepared a formal argument on the occasion. I find no difficulty, however, in assigning the general reasons, which induce me to concur in affirming the decree of the Circuit Court.

An *American* public vessel of war re-captures an *American* merchant vessel from a *French* privateer, after 96 hours possession, and the question is stated, what salvage ought to be allowed? There are two laws on the subject: by the first of which, only one-eighth of the value of the re-captured property is allowed; but by the second, the re-captor is entitled to a moiety. The re-capture happened after the passing of the latter law: and the whole controversy turns on the single question, whether *France* was at that time *an enemy?* If *France* was an enemy, then the law obliges us to decree one half of the value of ship and cargo for salvage: but if *France* was not an enemy, then no more than one-eighth can be allowed.

The decree of the Circuit Court (in which I presided) passed by consent; but although I never gave an opinion, I have never entertained a doubt on the subject. Congress is empowered to declare a general war, or congress may wage a limited war; limited in place, in objects, and in time. If a general war is declared, its extent and operations are only restricted and regulated by the *jus belli*, forming a part of the law of nations; but if a partial war is waged, its extent and operation depend on our municipal laws.

What, then, is the nature of the contest subsisting between *America* and *France?* In my judgment, it is a limited, partial, war. Congress has not declared war in general terms; but congress has authorised hostilities on the high seas by certain persons in certain cases. There is no authority given to commit hostilities on land; to capture unarmed *French* vessels, nor even to capture *French* armed vessels lying in a *French* port; and the authority is not given, indiscriminately, to every citizen of *America*, against every citizen of *France*; but only to citizens appointed by commissions, or exposed to immediate outrage and violence. So far it is, unquestionably, a partial war; but, nevertheles, it is a public war, on account of the public authority from which it emanates.

There are four acts, authorised by our government, that are demonstrative a of state of war. A belligerent power has a right, by the law of nations, to search a neutral vessel; and, upon suspicion

1800. suspicion of a violation of her neutral obligations, to seize and carry her into port for further examination. But by the acts of congress, an *American* vessel it authorised: 1st. To resist the search of a *French* public vessel: 2d. To capture any vessel that should attempt, by force, to compel submission to a search: 3d. To re-capture any *American* vessel seized by a *French* vessel; and 4th. To capture any *French* armed vessel wherever found on the high seas. This suspension of the law of nations, this right of capture and re-capture, can only be authorised by an act of the government, which is, in itself, an act of hostility. But still it is a restrained, or limited, hostility; and there are, undoubtedly, many rights attached to a general war, which do not attach to this modification of the powers of defence and aggression. Hence, whether such shall be the denomination of the relative situation of *America* and *France*, has occasioned great controversy at the bar; and, it appears, that Sir *William Scott*, also, was embarrassed in describing it, when he observed, that "in the present *state of hostility* (*if so it may be called*) between *America* and *France*," it is the practice of the *English* Court of Admiralty to restore, re-captured *American* property, on payment of a salvage. *Rob. Rep.* 54. *The Santa Cruz.* But, for my part, I cannot perceive the difficulty of the case. As there may be a public general war, and a public qualified war; so there may, upon correspondent principles, be a general enemy, and a partial enemy. The designation of "*enemy*" extends to a case of perfect war; but as a general designation, it surely includes the less, as well as the greater, species of warfare. If congress had chosen to declare a general war, *France* would have been a general enemy; having chosen to wage a partial war, *France* was, at the time of the capture, only a partial enemy; but still she was an enemy.

It has been urged, however, that congress did not intend the provisions of the act of *March* 1799, for the case of our subsisting qualified hostility with *France*, but for the case of a future state of general war with any nation: I think, however, that the contrary appears from the terms of the law itself, and from the subsequent repeal. In the 9th section it is said, that all the money accruing, "*or which has already accrued from the sale of prizes*," shall constitute a fund for the half-pay of officers and seamen. Now, at the time of making this appropriation, no *prizes*, (which *ex vi termini* implies a capture in a state of war) had been taken from any nation but *France*, those which had been taken, were not taken from *France* as a friend: they must consequently have been taken from her as an enemy; and the retrospective provision of the law can only operate on such prizes. Besides, when the 13th section regulates "the bounty given by the *United States* on any national ship of war, *taken from the enemy*, and brought into port," it is obvious, that even if the bounty has no relation to previous captures, it must operate from the moment of passing the act,

act, and embraces the case of a national ship of war taken from *France* as an enemy, according to the existing qualified state of hostilities. But the repealing act, passed on the 3d of *March* 1800, (subsequent to the re-capture in the present case) ought to silence all doubt, as to the intention of the legislature: for, if the act of *March* 1799, did not apply to the *French* republic, as an enemy, there could be no reason for altering, or repealing, that part of it, which regulates the rate of salvage on re-captures. 1800.

The acts of congress have been analysed to show, that a war is not openly denounced against *France*, and that *France* is no where expressly called the enemy of *America*: but this only proves the circumspection and prudence of the legislature. Considering our national prepossessions in favour of the *French* republic, congress had an ardous task to perform, even in preparing for necessary defence, and just retaliation. As the temper of the people rose, however, in resentment of accumulated wrongs, the language and the measures of the government became more and more energetic and indignant; though hitherto the popular feeling may not have been *ripe* for a solemn declaration of war; and an active and powerful opposition in our public councils, has postponed, if not prevented that decisive event, which many thought would have best suited the interest, as well as the honour of the *United States*. The progress of our contest with *France*, indeed, resembles much the progress of our revolutionary contest; in which, watching the current of public sentiment, the patriots of that day proceeded, step by step, from the supplicatory language of petitions for a redress of grievances, to the bold and noble declaration of national independence.

Having, then, no hesitation in pronouncing, that a partial war exists between *America* and *France*, and that *France* was an enemy, within the meaning of the act of *March* 1799, my voice must be given for affirming the decree of the Circuit Court.

PATERSON, *Justice*. As the case appears on the record, and has been accurately stated by the counsel, and by the judges, who have delivered their opinions, it is not necessary to recapitulate the facts. My opinion shall be expressed in a few words. The *United States* and the *French* republic are in a qualified state of hostility. An imperfect war, or a war, as to certain objects, and to a certain extent, exists between the two nations; and this modified warfare is authorised by the constitutional authority of our country. It is a war *quoad hoc*. As far as congress tolerated and authorised the war on our part, so far may we proceed in hostile operations. It is a maritime war; a war at sea as to certain purposes. The national armed vessels of *France* attack and capture the national armed vessels of the *United States*; and the national armed vessels of the *United States* are expressly authorised and directed to attack, subdue, and take, the national armed vessels of

1800. of *France*, and also to re-capture *American* vessels. It is therefore a public war between the two nations, qualified, on our part, in the manner prescribed by the constitutional organ of our country. In such a state of things, it is scarcely necessary to add, that the term "*enemy*," applies; it is the appropriate expression, to be limited in its signification, import, and use, by the qualified nature and operation of the war on our part. The word enemy proceeds the full length of the war, and no farther. Besides, the intention of the legislature as to the meaning of this word, enemy, is clearly deducible from the act for the government of the navy, passed the 2d of *March* 1799. This act embraces the past, present, and future, and contains passages, which point the character of enemy at the *French*, in the most clear and irresistible manner. I shall select one paragraph, namely, that which refers to prizes taken by our public vessels, anterior to the passing of the latter act. The word prizes in this section can apply to the *French*, and the *French* only. This is decisive on the subject of legislative intention.

By the COURT: Let the decree of the Circuit Court be affirmed.

HIGH COURT

OF

ERRORS AND APPEALS

OF

PENNSYLVANIA.

July Session 1799.

Present M'KEAN, Chief Justice.

SHIPPEN and SMITH, } Justices of the Supreme Court; and

RUSH, RIDDLE, ADDISON, and COXE, } Presidents of the Circuits of Common Pleas.

Ludlow, Plaintiff in Error, *versus* Bingham.*

IN error. This was an action by the indorsee, against the drawer, of a promissory note; and the following case was submitted for the opinion of the Court:

"Sometime about the end of *December* 1792, the defendant, "for a full and valuable consideration, that is to say, in conside-"ration of *Wm. Duer*, of the city of *New-York*, relinquishing to "him (the defendant) his the said *Wm. Duer's* right to a certain "portion of a contract, made with the state of *Massachusetts*, for

* The question involved in this cause had been argued in the Supreme Court; but before any opinion was given by the Judges, and in order to avoid delay, a judgment was entered, by consent, for the defendant, on which the present writ of error was brought, with an agreement, that the decision of the High Court of Errors and Appeals, should, also, be binding in the cases of *M'Evers* v. *Bingham*, *Service* v. *Bingham*, and *M'Crea* v. *Bingham*, all depending in the Supreme Court on the same facts. The present report comprises the arguments in both Courts.

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1799. "the purchase of a large tract of land, caused to be paid and de-
"livered at the city of *New-York* to the said *Wm. Duer*, the se-
"veral promissory notes in the declaration mentioned; all of
"which were drawn by the defendant, payable at the bank of
"the *United States*, to the order of *Henry Knox*, esq. a citizen of
"*Massachusetts*, and indorsed in blank by him to the said *Wm.*
"*Duer*, whose property they became by the said delivery; and
"continued so to be, until he parted therewith, as hereafter men-
"tioned. On the 11th of *May* 1793, a foreign attachment issued
"out of the Court of Common Pleas for *Philadelphia* County, at
"the suit of *Nicholas Fish*, a citizen of the state of *New-York*,
"against the said *Wm. Duer*, which was, on the same day, duly
"served in the hands of the defendant, with notice to him as gar-
"nishee; and on executing a writ of inquiry, in the said attach-
"ment, the sum of 4103*l.* 15*s.* 6*d.* *Pennsylvania* currency was, on
"the 8th of *March* 1794, found due to the plaintiff therein, from
"the said *Wm. Duer*, and judgment thereupon rendered, which
"judgment still remains in full force and unsatisfied. At the
"time of issuing and serving the said attachment as aforesaid,
"the said notes remained in the possession, and were the property
"of the said *Wm. Duer*, and continued so to be, until some time
"afterwards, in the same year, when they were paid away by
"him in *New-York* to citizens of *New-York*, for a full and valu-
"able consideration, by delivery, and without his indorsement
"thereon; and, afterwards, they were severally paid away and
"delivered in *New-York*, by the persons so receiving them res-
"pectively (before the bringing of the actions) citizens of *New-*
"*York* (except *M'Crea*, who is a citizen of *Pennsylvania*) respec-
"tively for full and valuable considerations and without any
"knowledge on their parts of the said attachment having been
"served or issued, other than such knowledge as may be deemed
"to result from the record of the said attachment, and the pro-
"ceedings thereon; and without any knowledge of the agree-
"ment so as aforesaid made between the said *Wm. Bingham*
"and *Wm. Duer*. It is agreed that promissory notes were, at the
"time of negotiating the said promissory notes, and still are,
"negotiated and considered in *New-York*, upon the same footing
"as foreign bills of exchange, according to the custom of
"merchants.

"Questions submitted to the opinion of the Judges: Were the
"sums of money, or any part thereof, due on the said notes,
"liable to the said attachment, and bound thereby in the hands of
"the defendant? Or, is he bound to pay the plaintiffs in these
"causes, notwithstanding the said attachment, and proceedings
"thereon, the amount of the said notes, or any part thereof?
"After an opinion shall be given on these questions, it is agreed,
"that the Court shall be authorised to give such judgment in
"the several actions, as the facts here stated, and as the facts

"that

" that shall be brought forward, under the subjoined agreement, 1799.
" shall induce them to deem right."

The case was argued by *Ingersoll* and *Dallas*, for the plaintiff, and by *Lewis* and *E. Tilghman*, for the defendant.

For the plaintiff, *Dallas* premised, that the case admits all the facts essential to constitute a legal right of recovery: the note was originally issued for a valuable consideration; it was delivered in *New-York*; all the parties to the note and the attachment, except *Bingham*, are citizens of *New-York* or *Massachusetts*; it was attached before it was due; the note vested in *Duer* by the delivery, and was afterwards divested for a valuable consideration, without notice of the attachment, by delivery and without *Duer's* indorsement; and promissory notes are on the same footing in *New-York* as foreign bills of exchange. Whether, then, we consider, 1st, the nature of the contract between the original parties to the note; or, 2d, the operation of the transfer, by delivery, from *Duer* to the purchasers of the note, the plaintiff is entitled to recover.

1st. The original contract was an agreement by *Bingham*, to give his own note, payable to *Knox*, or order, indorsed in blank, by *Knox*, to *Duer*; and such a note is transferable merely by delivery. *Doug.* 633. 9. This quality of transfer *by delivery*, was the essence of the contract; so that the person holding the note on the day of payment might be entitled to receive the amount. As long as it remained in the hands of *Duer*, it was susceptible of such a transfer; the right could not be changed, modified, or defeated, by *Bingham* himself; and though a creditor of *Duer's* might attach a debt due to him, he could not alter the conditions of the contract on which the debt arose; on the one hand, to release *Bingham* from the obligation of those conditions; or, on the other hand, to injure him for performing them.

But the place of negotiating the contract was *New-York*, and the note was actually delivered there. The law of *New-York*, therefore, is to be regarded in construing the contract and obligation of the parties. It is true, that the note is dated at *Philadelphia*, and is made payable at the bank of the *United States*: but *Philadelphia* merely designates the place of the drawer's residence; the note is not payable at his house; and being payable at the bank of the *United States*, does not necessarily make it payable in *Pennsylvania*. 1 *vol.* 284. *Swift's edit. Acts of Congress.* The note never passed from the drawer in *Pennsylvania*; but continued in his hands, in the nature of an *escrow*, till it was delivered in *New-York*. The delivery there, first gave life to the note. It was, of course, contemplated (as the event has proved) that the note should be negotiated where it was delivered; that it should circulate there till the day of payment; and that on the day of payment it should be presented at the bank of the *United*

1799. *States*. Referring, therefore, to the *lex loci* as our guide, a promissory note must be regarded as a foreign bill of exchange, which can never be affected in the hands of a *bonâ fide* indorsee, on account of any circumstances, not appearing on the face of the instrument itself. 2 *Dall. Rep.* 396. But even considering *Philadelphia* as the place of executing the contract, what would be the effect? It is the place where *Bingham* is to pay according to the terms of the contract; that is, to pay to any *bonâ fide* holder by the indorsement of *Knox*, and the delivery of *Duer*; so that it could not be ascertained to whom he was debtor on the note, till the day of payment. There is no analogy between the present case, and the case of *M'Cullough* v. *Huston*. 1 *Dall. Rep.* 453. There the equity allowed was between the drawer and payee, arising on a note, which was not like a foreign bill of exchange, but was of a restricted negotiable character under an act of assembly. Even if this had been, strictly, a *Pennsylvania* transaction, *Ludlow* would only have taken the note, on the principle of *M'Cullough* v. *Huston*, subject to the equity existing between *Bingham*, the drawer, and *Knox*, the payee. Besides, the Court have repeatedly decided, that the principle of that case did not apply to accommodation notes. It is, likewise, to be observed, that by the act of assembly the drawer is liable for no more than is due upon the note at the time of the first assignment; and there is no question in the present case as to the amount, but merely as to whom the amount is payable.

2d. The operation of *Duer's* transfer by delivery is conclusive. It is a great ruling principle, that circumstances existing between parties to a contract, shall not affect the rights of third persons. Nothing that passed between *Bingham* and *Duer*, which the face of the instrument does not show; no right which *Fish* acquired against *Duer*, ought to affect *Ludlow*, without notice express or implied. A latent bar ought never to impeach the validity of an apparently good transfer of negotiable interests. 1 *Lofts. Gilb. Evid.* 194, 5. On the face of the note, the contract of *Bingham* has no relation at all to *Duer*; it does not appear that *Duer* was ever interested in it; and though it may be presumed that the first purchaser, who took the note by *Duer's* delivery, was apprised of the fact, the presumption, will not in any degree, apply to the plaintiff. The case admits, indeed, that there was no express notice of the attachment, and there is no ground to argue an implied notice from the record: for, even if a citizen of *New-York*, purchasing a note, or a bill of exchange in *New-York*, is bound to respect the laws of *Pennsylvania*, and to examine the records of all our Courts, before his purchase, to ascertain whether an attachment has not issued against every indorser of the note, what was there that could lead to such an examination, in relation to *Duer*, who is not a party to the note, and might be an utter stranger to the present plaintiff? Again: if notice is to be presumed from the

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lis pendens, it applies to a negotiation in *London*, or *Amsterdam*, as well as in *New-York*; to a bill of exchange, or any other contract, as well as to a promissory note; and to a negotiation through a hundred persons merely by delivery, as well as to such a negotiation by an individual. It is obvious, therefore, that the credit and facilities of commerce would be destroyed, should such a doctrine prevail. 1799.

The consequences of allowing the attachment as a bar would, likewise, be peculiarly unjust and injurious to the present holder of the note, who did not take it on the credit of *Duer*, and to whom *Duer* is in no wise bound. If, indeed, payment to *Fish* is a good payment of the note, it is a payment by the drawer; and, of course, it extinguishes all remedy against the indorsers, whose undertaking is merely a collateral one, to pay on the drawers default: so that the plaintiff, the last indorsee, taking the note, perhaps, on the credit of the indorsers, more than on the credit of the drawer, is deprived of every security, without any imputable *laches* on his part. But a fair holder, for a valuable consideration, of a bill of exchange, or note payable to bearer, is protected even against the true owner, who has been robbed, or has lost the instrument. 1 *Burr.* 452. 3 *Burr.* 1516. 1524. 1 *Bl. Rep.* 485. 4 *Bac. Abr.* 705, 6. The attachment cannot surely amount to more than a legal assignment: let it, therefore, be supposed, that *Duer* had assigned the note to *Fish*, with notice to *Bingham*; still the plaintiff, a purchaser of a negotiable instrument, for a valuable consideration, without notice, would be entitled to recover. Or let the stronger case be supposed, that on such an assignment, the note itself had been delivered to *Fish*, but that he had lost it, or had been robbed of it, that *Duer* had found, or had stolen it, and afterwards had sold it, the purchaser would be entitled to receive the money from *Bingham*, and not the assignee. The rule is exemplified in the fullest manner, by considering the note as payable to bearer; for, unless *Duer* keeps it till it is due and payable, he is not the bearer contemplated by the contract; there is no engagement to pay him at all. Though, therefore, our law permits the attachment of debts due and payable, it is manifest that unless *Duer* held the note till it was actually due, it could not be payable to him, and if not payable to him, it could not be attached as his debt. If the instrument of contract had expressly provided, that something being done by a third person, the debt should become the property of that third person, when the act was done, *Duer's* interest must surely escape, and nothing would remain upon which an attachment against him could operate. Though not by the words, yet by the nature of the contract, the same effect is produced: for, a third person being the bearer on the day of payment, and presenting the note, at the place of payment, the contract is to pay him; and every antecedent transmissible interest, of which *Duer* was possessed, is effectually extinguished.

For

1799. For the defendant, *E. Tilghman* and *Lewis** contended that *Fish*, having attached, while the note was in *Duer's* hands, obtained a legal lien upon the money mentioned in it; although the money was not then due from the drawer, nor had the note ever been in the possession of the attacher; and that having pursued his lien, without *laches*, he is now entitled to the money. The general principle of the attachment law, is clearly in favour of *Fish*; and his claim must prevail, unless the plaintiff in error shows, that the note was a species of property not liable to an attachment.

In attempting to maintain this exemption from attachment it has been urged, that the note is subject to the laws of *New-York*, where promissory notes are upon the same footing with bills of exchange; and, therefore, it was not attachable: but the fact, and the inference deduced from it, are alike denied. The note was executed at *Philadelphia*; it is dated there; it was there indorsed by *Henry Knox*; and it is payable at the bank of the *United States*. It is true, that the note was delivered to *Duer* in *New-York*, agreeably to *Bingham's* contract; but *Duer* well knew that it had been previously executed in *Philadelphia*, and by the delivery in *Philadalphia*, *Knox's* indorsement took effect. An express stipulation on the face of the note, made it payable at the bank of the *United States*; and it is an established principle, that a contract for the payment of money is to be governed by the laws of the place, where it is payable. *Prac. in Chan.* 128. 2 *Burr.* 1083, 4. 1 *Bl. Rep.* 258, 9. It is not a sufficient answer, that the bank of the *United States* is not permanently fixed at *Philadelphia*; for, the parties to the contract, in making it the place of payment, considered it as at *Philadelphia*; and there could be no idea of a removal of the bank, while *Philadelphia* continued the seat of the federal government; inasmuch as it is expressly provided, that the officer at the head of the treasury department shall be furnished with weekly statements of the affairs of the institution, and should be entitled to inspect the general accounts in relation to such statements: 1 *vol.* 293. *sect.* 7. *art.* 16. (*Swift's edit*). The place of payment was, evidently, fixed for the drawer's convenience: and although, if there is a place appointed for payment, a personal application need not be made to the drawer of a note (2 *Hen. Bl. Rep.* 509.) yet, stipulating that payment should be made at the bank of the *United States*, shows that the law of *Pennsylvania* was to furnish the rule, for construing the legal effect of the contract.

Again, it is urged, that the note was in the nature of an *escrow* till it was delivered to *Duer* at *New-York*; and that receiving its life in *New-York*, it must be governed by the law of the place of

* *Tilghman* having embraced in his argument on the present occasion, all that had been suggested by *Lewis* in the Supreme Court, the latter declined entering again into the discussion on the writ of error.

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its existence. But the note is payable in four years *from its date*; and, therefore, even considering it in the nature of an *escrow*, when the condition was discharged, it took effect, with relation to its date and execution in *Philadelphia*. There is nothing to show, that with regard to this note, more than with regard to any other note executed and payable in *Philadelphia*, but delivered to the indorsee in *New-York*, it was in the contemplation of the parties, that *New-York* should be the scene of negotiation. It is in vain for the counsel to assert, that it could not have been put in circulation at *New-York*, with a view to the laws of another state; for, the date of the note, and the place prescribed for its payment, are premises from which the legal inference is insurmountable, that the law of *Pennsylvania* was contemplated. Let it be supposed, that on the day of payment *Bingham* had tendered the money at the bank of the *United States*, when no person was ready to receive it: the tender, if legal, would discharge him from any claim for future interest; but by what law would the validity of the tender have been tried? Or suppose, that the note had been invalid by the law of *Pennsylvania*, could it have been rendered valid by reference to the law of *New-York*? 1799.

It has been objected, however, as another ground of opposition to the lien of the plaintiff in the attachment, that even an attachment cannot prevail against the *bonâ fide* holder of the note, for a valuable consideration, and without notice: while it remained in the hands of *Duer*, the adverse counsel admit, that it was subject to an attachment; but they contend, that the defendant in the attachment might defeat the lien, whenever he pleased, by the mere delivery of the note. It will hereafter be shown, however, that the concession and the argument cannot be reconciled. But the corner-stone of the defence is, that notes of this description are to be governed only by what appears on the face of the paper; and this, undoubtedly, is the law in *England* (whence the authorities have been adduced) except as to attachments. In *Pennsylvania*, however, the face of the paper is not the criterion, on which a *bonâ fide* purchaser is to judge. The distinction arises on this ground, that in *England* the holder of a promissory note is not considered as an *assignee*, but in *Pennsylvania* he is so considered; *Doug.* 614. and although an *indorsee* in *England* is discharged from all equitable circumstances existing between the original parties, which do not appear on the instrument itself, an *assignee* of a note, in *Pennsylvania*, is bound to resort to the drawer, to know whether there is any defence equitable or legal. Showing, then, that the face of the note is not the criterion, we destroy the very foundation of the plaintiff's claim. That the indorsee takes the note subject to all the equity between the drawer and indorser has been expressly adjudged. 1 *Dall. Rep.* 442, 3, 4. The negotiability of the note is qualified, not absolute. The first indorsee, indeed, is as innocent, as any subsequent one; and

1799. and if the equity of the drawer's defence against the indorser is to affect the first indorsee, there can be no just reason why it should not equally affect the second: the face of the note is the same in the one case, as in the other; the second indorsee can recover no more from the drawer than the first; and it may as fairly be contended that a payee could defeat an attachment by indorsement, as an indorsee by delivery.

It is asked, whether it is reasonable to expect that the purchaser of the note in market, should inquire after attachments, or liens against *Duer*, whose name does not appear on the note? And yet the plaintiff himself relies on the supposed terms, on which the note was delivered to *Duer* in *New-York*. But the fact is, that the note came to *Duer* for a valuable consideration, as a common note, not merely as an accommodation note; and our argument is, that the face of the note affording no criterion to protect the holder from a set-off, or attachment, against *Duer*, it was incumbent on the person purchasing it, to apply to the drawer for information, not, particularly, as to the right of *Duer*, but, generally, as to the validity of the note.

The adverse counsel urge, that if payment by *Bingham* to *Fish* will be good, then the note will be extinguished, and the holder can have no remedy against any of the indorsers. But might not each indorser recover from the person with whom he dealt, in an action for money had and received? At all events, each party to the note runs his risque; it is nothing more than the risque run in the case of notes given in *England*, upon usurious and gaming contracts; nor is it harder than the operation of the principle in *M'Cullough* v. *Huston*, which would have produced the same decision, had there been twenty indorsers on the note then in controversy.

That *Fish's* right could not be stronger, as plaintiff in an attachment, than as the assignee of *Duer*, is a position not true to every intent. For instance; *Fish* might attach the debt before it was due. Again; in the case of an assignment he would be guilty of *laches*, and ought to answer, for not taking possession of the note, or for suffering it to be lost, or stolen; but from the very nature of the attachment, a hostile process against *Duer*, *Fish* could not obtain the possession of the note, and the law will aid and supply the want of it. Nor is it correct to say, that *Bingham* was a debtor to no man till the day of payment; and then only to the bearer of the note; for, the obligation of the drawer was coeval with the execution of the note, which was *debitum in præsenti, solvendum in futuro;* and a debt of that description is clearly attachable. 2 *Dall. Rep.* 211. Though the drawer is guilty of some negligence in making a payment, without indorsing it on his note; yet, even in his case, it has been shown, the payment will be allowed in *Pennsylvania* against a *bonâ fide* holder, without notice: and, surely, the case against the

the garnishee is much stronger, the plaintiff in the attachment being in the prosecution of a legal right, and founding his demand against the garnishee upon the positive provisions of the act of assembly, which, though it is in some respects analogous, in others extends further than the custom of *London*. The words of the original act speak only, it is true, of goods, chattels and effects; but they were always construed to include debts, and even lands; and the supplement expressly extends to the goods, chattels, monies, effects, and credits of the defendant: 2 *vol.* 733. *Dall. edit.* The attachment, *ipso facto*, secures the effects attached, to abide the judgment of the Court: 1 *vol. Penn. Laws*, *p.* 60. *Dall. edit.* The words of the domestic attachment law (a law made *in pari materia*, and, therefore, to be regarded on the present question of construction) expressly recognise "lands, goods, chattels, and effects," as objects of attachment; and among the powers vested in the auditors under such an attachment, they are authorised "to "grant and assign, or otherwise to order or dispose of, all or any "of the debts due, or to be due, to and for the benefit of the said "defendants [in the attachments] to the use of their creditors. "And, that the same grant, assignment, or disposition, of the "said debts so to be made, shall vest the property, right, and "interest, thereof, in the person or persons, to whom it shall be "so granted, assigned, or ordered, by the auditors; so that such "assignees may sue for and recover the said debts in their own "names, and detain the same to their own use. And that after "such grant, assignment, or disposition, made of the said debts, "neither the defendants, nor any other to whom such debts shall "be due, shall have power to recover the same, nor to make any "release or discharge thereof." *Ibid. s.* 2. 7. *p.* 194, 5, 6, 7. The domestic attachment has, indeed, the effect of a bankruptcy; but if the plaintiff's doctrine is true, a bankrupt's agent may effectually, by mere delivery, pass away notes indorsed in blank. 1799.

In *Carthew* 26, it is said, that bills of exchange are attachable, according to the custom of *London*; and the adverse counsel admits, that the note was attachable, while it remained in the hands of *Duer*. But if so, how can the attachment be dissolved, without appearing to it, on the terms of the law? There is no *laches* on the part of the plaintiff; and if the note could be attached at all, it must be effectually attached. It is idle to allege, that the success of the attachment must depend on the note's remaining with the defendant, till the attachment had run its course. Suppose a judgment had been obtained against the garnishee before the note was due, with a stay of execution till it became due, could this lien be defeated by a subsequent sale and delivery of the note? Suppose a suit instituted by the indorsee of a note against the drawer, and the note afterwards lost, or stolen; would the claim of a *bonâ fide* purchaser, in such cases, supersede the suit, or prevail against the plaintiff in it, after he had obtained

1799. obtained a judgment? Suppose a bill of exchange protested for non-acceptance, a suit and judgment upon it, and afterwards, but before the day of payment, it was lost; a bill may be negotiated after such a protest (2 *Dall. Rep.* 396.) and, yet, would a purchaser be preferred to the plaintiff in the suit, or could he recover a second time from the drawer? The attachment ought, in short, to be regarded in the nature of a suit brought by *Duer* himself.

The hardship of the case is not so great, or so unprecedented, as to require an extraordinary interposition of the Court, to change, or modify, on equitable principles, the operation of a positive law. In *England*, notes, and other securities, given upon usurious, or gaming, considerations, are void in the hands of a *bonâ fide* holder, for a valuable consideration, without notice, even as against the drawer, who was accessary to the injury and embarrassment by issuing the note. In those instances, as well as in the present instance, no warning appears on the face of the paper; and the bar is, emphatically, a latent bar, no record existing by which it could be traced, or ascertained. Is it not as reasonable, as just, that the attachment should operate in favour of a *bonâ fide* creditor of *Duer*, who had no power to obtain possession of the note; as that the original taint in the consideration, of a gaming, or an usurious, contract, should operate in favour of a party to the illegal transaction?

Upon the whole, *Fish* has attached when the property and the possession of the note, were both in *Duer*; and his opponents must convince the Court, that an attachment, once operative, can be legally done away, without some *laches*, or relinquishment, on his part.

Ingersoll, for the plaintiff in error, in reply. The question under consideration is novel, curious, and, in its consequences, most extensive: it is not too much to say, that the negotiable paper of *Philadelphia*, depends, for its circulation abroad, upon the event of the cause. The subject may be considered, with a view to support two positions: 1st. That the note, under the circumstances of the case, was negotiable, the property of which, after the indorsement in blank, passed by delivery as a bill of exchange payable to bearer. 2d. That negotiable paper of this description, is not within the spirit, intent, and meaning, of the attachment law of *Pennsylvania*; especially when put into circulation and negotiated out of the state.

1st. The note passed by delivery as a bill of exchange, payable to bearer. Under this general proposition, we derive the title of the plaintiff immediately from *Henry Knox*, not through *William Duer*: but against the proposition several objections have been urged. It is said, that in *Pennsylvania* promissory notes are not within the law merchant; that they are regulated by the common law principle, in pursuance of which every assignee takes the instrument

strument subject to every equitable consideration that affected the assignor; that the act of assembly places notes on a footing with bonds, enabling the indorsee to recover only what shall appear to have been due at the time of assignment; and that these doctrines have been exemplified and enforced by legal decisions. But the answers to these suggestions, will satisfactorily show, either that they are not founded in fact, or that they are inapplicable on the present occasion. 1799.

Promissory notes in *Pennsylvania* are governed by the statute of *Anne*, as far as respects the payee's remedy against the drawer, in an action upon the notes themselves; and, therefore, they are within the law merchant. The act of assembly, when it provides a further remedy for the indorsee, implies and recognises the law to be so. At common law, a promissory note could not be declared on; all the declarations on record upon promissory notes, state the liability as arising under the statute of *Anne*; and the distinction in this particular has been repeatedly recognised by our Courts. The statute of 9 & 10 *W.* 3. *c.* 17. placed inland bills of exchange upon a footing with foreign bills; and the statute of 3 & 4 *Anne*, *c.* 9. placed promissory notes upon a footing with inland bills: after an indorsement, therefore, promissory notes are to be regarded as foreign bills of exchange. It is true, that our act of assembly limits the drawer's responsibility to an indorsee, by the measure of his responsibility to the payee; but nothing can be more extravagant, or unjust, than the deductions which have been attempted, at different times, from that provision, as recognised in *M'Cullough* v. *Huston*. 1 *Dall. Rep.* 444. It was once, indeed, introduced as an authority to release the friendly indorser of an accommodation note, from all obligation to pay the indorsee: but the Court declared, that the determination only applied to the case of a drawer's being cheated by the payee (when, as in the instances of gambling and usurious notes in *England*) he should not be made liable to the indorsee. What analogy, however, can be suggested between *M'Cullough* v. *Huston*, and the present case? The defendant is not called on to answer the holder of the note further than if the payee was plaintiff; there is no idea that the defendant has been defrauded; the consideration for which the note was given has not failed; the defendant has made no payment; he owes the full nominal amount of the note; and, in short, he is a mere stake-holder. In the cases that have been hitherto decided, the *dramatis personæ* were the drawer, the payee, or indorser, and the indorsee: here a new corps of actors appears, the creditors of an intervening holder of the note, as plaintiffs in the attachment. In those cases, there was fraud; in the present case, the contest is between an innocent holder of the note, and a claimant by legal process. In those cases, if the remedy failed against the drawer, it might be pursued against the indorser; in the present case, the debtor in the attachment is not an indorser, the person

1799. who sold to the plaintiff is not an indorser; and, as far as appears by the state of the case, we are without remedy, unless this action succeeds.

The nature of the promissory note in question remains, then, to be ascertained on abstract principles, public policy, general convenience, the reason of the case, and the design of the attachment law. On the face of it, the note appears calculated for general circulation, unaffected by local circumstances: it is payable at the bank of the *United States*; and that institution was not stationary, for its *commencement* of business only was fixed at *Philadelphia*. A demand at the bank of the *United States*, wherever its business was transacted, when the note became due, was the only condition that remained to be performed. 2 *H. Bl.* 509. The note took effect and became operative by the delivery only, which was in *New-York*: *M'Kimm* v. *Elton*.* And there promissory notes are on footing with bills of exchange. It was the intent and meaning of the parties that the note should circulate there, and be governed by the law of that state. *Conventio vincit legem. Reed* v. *Ingraham. Post.* The act of assembly, indeed, cannot refer to notes delivered and put in circulation out of *Pennsylvania*; and surely, the objection arising under our local law, ought not to proceed from the plaintiff in the attachment, a citizen of *New-York*, a party to, and bound by, the laws of that state. The note was originally in the form of a bank post note; and after the indorsement in blank, it assumed the character of a common bank note. It has, likewise, all the distinguishing characteristics of a bill of exchange: it is entitled to three days grace; the indorser is answerable to the indorsee, without express covenant, though the note be forged; and immediate notice must be given to the indorser, if the note is dishonoured.

2d. But negotiable paper of this description, is not within the spirit, intent, and meaning of the attachment law of *Pennsylvania*. The opposite doctrine would render our act of assembly a perfect snare; and inevitably prevent the extra-territorial negotiation of any note, or bill of exchange, on which any citizen of *Pennsylvania* was drawer or acceptor. For, if *Duer* had purchased the note one hour, and sold it the next after the attachment was laid, the rule contended for would equally apply. Such is the absurd and monstrous inconvenience to which this pretension leads, that nei-

* *M'Kimm* v. *Elton*. This case was decided in the Supreme Court some years ago. The defendant proposing to give a preference to the plaintiff, in an arrangement with his creditors, drew a note in the plaintiff's favour, and signed it; but, doubting afterwards the propriety of the measure, he put the note into his own desk. The plaintiff heard of this circumstance and applied to the defendant's wife, in the defendant's absence, for the note; who having a key of the desk, unlocked it, and delivered the note to the plaintiff. It was adjudged, that the mere signing of the note, without a delivery by the drawer to the payee, gave it no effect; and that the plaintiff could not take advantage of a possession, surreptitiously obtained.

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ther the person who sells, nor the person who buys, can know the injustice that they are concurring to practise: the one has sold what he had no right to part with, and the other has paid a valuable consideration for nothing; and, yet, the former shall be innocent, and no negligence can be imputed to the latter! The *lis pendens* has no extra-territorial operation, and cannot be regarded as implied notice to citizens of other countries. 1799.

But the attachment cannot, surely, give a better right to *Fish* to claim payment from the drawer, than a sale for value, with notice to the drawer, though without delivery of the note; or (in the cases already put) a sale and payment, with delivery of the note, which is afterwards, however, lost or stolen, and negotiated *bonâ fide*. By the act of assembly debts may be attached, and so may money: but suppose a sum of money had been specifically attached, and the garnishee had afterwards paid it away, could the money have been followed into the hands of a *bonâ fide* receiver? If goods, indeed, are attached, and afterwards lost, or stolen, they may be pursued, and if found again, will still be liable to the attachment: but not so, in the case of money; a distinction which exemplifies and establishes the rule on our part. For, notes payable to bearer are regarded as money; and the reason applying equally to both objects, the law must be the same. Nor can an attachment alter the nature and conditions of a contract; as, in the present instance, the negotiable nature of the instrument, and the condition that it shall pass by delivery. It is the same thing, whether the condition is expressed by the parties, or implied by law. An attachment of real estate would not prevent a springing use, or a resulting trust; the estate, might, therefore, change its owner pending the attachment. And why not the property of a note, liable, by the nature of the contract to this contingency, that it shall cease to represent a debt owing to *Duer*, and become a debt owing to *Ludlow*, if *Ludlow* is the bearer on the day of payment? Debts, in general, are not liable to such contingencies and conditions; they are not negotiable; and, therefore, (though it is only by implication our law is extended to them) they may with certainty be subjects of attachments. But even stock-contracts, or bonds, payable to a man, or his assigns, cannot be affected by an attachment made in another state.

Does it, then, require a greater latitude of construction, than is authorised by precedent, to exempt negotiable paper, circulating abroad, from the meaning and operation of the attachment law? It is not to controul our Act of assembly by the law of *New-York*, but to give to our Act a reasonable interpretation. While paper credit remains in use, it should be regulated by plain and uniform rules; 1 *Dall. Rep.* 270. and that the *bonâ fide* purchaser should only be affected by what appears on the face of the instrument, is the characteristic of negotiable paper. 1 *Loft's Gill.* 195.

1799. 195. 2 *Dall. Rep.* 396. The departure from the strict terms of a law, in a variety of other instances, will authorise a much greater latitude of construction than the present case requires. The cases of the sick sailor, who remained in a foundering ship, of the surgeon who bled a man in the street, and of ecclesiastical leases, in *England*; 1 *Bl. Com.* 60. as well as the case of unrecorded mortgages here, 1 *Dall. Rep.* 434. are strong examples. But construction on one side or the other forces itself upon the Court. An indorser is guarantee for the payment of the note to the holder, if it is not paid by the drawer; a payment to one not the holder, is not an exception known to the law merchant; and can a municipal regulation alter the general law, operating on a negotiation out of the state? A statutory assignment by bankruptcy (which is an assignment of rights of action, and stronger than an attachment) will not enable the assignees to claim from the drawer against a *bonâ fide* holder. A judgment in an attachment is not conclusive evidence of a debt out of the state, in which it is rendered: 1 *Dall. Rep.* 261. and the death of the defendant, after *interlocutory* judgment, destroys the attachment, because there is not any *party* in Court; because executors, or administrators are not liable to enter special bail; and because no foreign attachment can issue against executors or administrators. 1 *Dall. Rep.* 248. (1)

The attachment law of *Pennsylvania* is a copy, in some measure, from the original mode established as the custom of *London*; and that the currency of bills and notes in *London* (which even pass under a bequest of *money* in a will. 1 *Burr.* 358. 3 *Burr.* 1516. 1524, 5. 1530. 1 *Bl. Rep.* 485. 4 *Bac. Abr.* 705, 6. 2 *Burr.* 675. 1225.) should be impaired and endangered in this way, is so improbable, that the most authoritative precedents are necessary to induce belief. A precedent is, however, cited, but of so light a texture, that it will hardly bear examination: it is cited, too, against a *bonâ fide* holder, who never knew of *Duer's* interest, or possession of the note; who may fill up the blank indorsement as he pleases; 1 *Bl. Rep.* 296. who may deduce his title immediately from *Knox*; 2 *Burr.* 1225. 1216. and who, in that way, can never be injured by any thing which *Duer* has done. The solitary precedent is cited from *Carthew* 26. where it is said, that a bill of exchange is liable to attachment. But this was not the point of the cause, and ought, therefore, to be disregarded; 1 *Burr.* 526. 3 *Burr.* 1730. the only point turning on the question, whether a prohibition ought to issue. The debt due, and the debt attached, were both upon bonds, not on a bill of exchange. *Holt.* 179. The incidental observations re-

(1) The defendant died after final judgment, but before the money actually paid by the garnishee: *query*, the effect of his death, since the attachment might be dissolved by entering special bail at any time before such payment? This point was stated, but not relied on, by the plaintiff's counsel.

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lied on, did not proceed from the Court, or any member of it; and the same case is reported in three other books, of superior character, without a word of a bill of exchange, even by way of allusion, from the Court, the counsel, or the reporters. *Holt.* 179. 1 *Show.* 9. *Comb.* 109. But even this precedent might be explained, consistently with our doctrine, by supposing it meant, that a bill of exchange might be attached after it was due; for, if negotiated after it is due, it can only be in a limited degree, liable to all exceptions as paper not negotiable. 2 *Dall. Rep.* 396. 1799.

After consideration the *unanimous* opinion of the COURT was delivered, by the *Chief Justice*, who, having stated the case, proceeded as follows:

M'KEAN, *Chief Justice.* The first inquiry, which it is necessary to pursue, is, where was the note in controversy made, in *Pennsylvania*, or in *New-York*? For, whether the act of assembly, relating to promissory notes, is to be introduced, or excluded, in forming our judgment, depends upon the answer, that shall be given to this preliminary question.

It appears, then, that, although the note was signed in *Philadelphia*, it was not delivered in *Pennsylvania*; but that the delivery was made by the order, or direction, of *Henry Knox*, the payee, to *William Duer* in the city of *New-York*, in pursuance of a contract, and for a valuable consideration. It is certain, that the bare signing of a note will not give it efficacy. It may be signed with a view to deliver it to the payee, on his complying with some previous stipulation; so that in case of a refusal, it would become useless, and might be cancelled by the drawer. A note is not, therefore, obligatory and valid, until it has been actually delivered to the party, for whose use it is drawn; and as it receives its life, existence, and negotiable character, at the place where it is so delivered, the law of that place must regulate all its subsequent operations. Hence, we consider the present note, as having taken effect in *New-York*, as being liable to the *lex loci* of that state (whether depending on positive statutes, or the adoption of the general commercial law) and as exempt from the provisions of our act of assembly, by which an indorsee is liable to all the equity, that the drawer could enforce against the payee.

The note having been thus paid, or delivered, in *New-York*, was deemed by the law of that state to be as negotiable as a foreign bill of exchange; and it is the nature of a bill of exchange, when indorsed in blank, to pass from hand to hand, by mere delivery, like bank notes payable to bearer. It is true, that the negotiability of the bill may be restrained by the qualified terms of an indorsement; but there must be express words to produce such an effect. In the present case, there was no restraint upon the

1799. the negotiability of the note; and in a due and fair course of circulation, it was delivered to *Duer*, he sold it to a *bonâ fide* purchaser, that purchaser sold it to others, till, at last, it became the property of the plaintiff. While, however, it was in the hands of *Duer*, an attachment issued at the suit of his creditors, and the drawer of the note was summoned as garnishee.

And here the second great question arises, whether, under these circumstances, the money due at that time, but not payable till long after, on a negotiable note, could be attached as the property of *Duer*, so as to defeat a subsequent purchaser, *bonâ fide*, and for a valuable consideration? In *England*, I believe, there would be no hesitation in deciding, that it could not. On the paper credit of that nation, much of its power and prosperity, (if not its very existence) will be found to depend; and, therefore, every thing that can impede, or injure, the circulation of bills of exchange, promissory notes, and bank notes, is anxiously guarded against. The situation of this country, however, is not the same; so that the legislature of *Pennsylvania* has not found it necessary to hold in equal respect the negotiability of promissory notes. When the act of assembly was passed, promissory notes were little used; they were given for small debts; and they seldom passed out of the hands of the payee before payment. The object of the act was, simply, to enable the indorsee to sue the drawer in his own name; but in giving this benefit, it was expressly provided, that he should recover no more, than was due at the time of the indorsement. This, therefore, lets in the equitable claims of the drawer against the payee, when he is sued by the indorsee; and even in *England*, there is no doubt, the consideration of a note may be inquired into, in an action between the payee and the drawer.

The present case, however, arises from a commercial transaction in the city of *New-York*, where the note was regarded in the light of a foreign bill of exchange. There is no judgment, or authoritative *dictum*, to be found in any book, that money due upon such a negotiable instrument, can be attached before it is payable; and in point of reason, policy, and usage, as well as upon principles of convenience and equity, we think it would be dangerous and wrong to introduce and establish a precedent of the kind. To adjudge that a note, which passes from hand to hand as cash; on which the holder may institute a suit in his own name; which has all the properties of a bank note payable to bearer; which would be embraced by a bequest of money; and which is actually in circulation in another state; should be affected in this way, by a foreign attactment, would be, in effect, to overthrow an essential part of the commercial system, and to annihilate the negotiable quality of all such instruments.

It has been said, that the purchaser of the note (*toties quoties*) was bound to inquire into its validity, by applying to the drawer before he bought it. But I cannot perceive the propriety, nor, indeed, the

the utility, of imposing such a duty in this, or any similar, case. The distance between the place of the drawer's residence, and the place of the note's circulation; and the frequency of the transfers of negotiable notes, payable at long dates; would render such a course highly inconvenient, if not impracticable; while the information to be derived from it, could only assure the purchaser, that an attachment had not issued at the very moment of his application; but could not protect him from an attachment which might issue in less than an hour afterwards, and sooner than his purchase could be accomplished. 1799.

Upon the whole, we are, unanimously, of opinion, that the attachment cannot be sustained; and that the bearer of the note on the day of payment, is entitled to recover the money from the drawer. The judgment for the defendant must, therefore, be reversed; and judgment entered for the plaintiff.

Smith, *Justice*. The opinion of the Court is certainly unanimous on the points that have been stated; but I wish it to be remarked, that my concurrence rests entirely on the particular circumstances of this case. The delivery in *New-York*, which gave effect to the note, and introduced the law of that state as our guide, is, exclusively, the ground of my assent.

Addison, *Justice*. To me, it would have made no difference, had the delivery and circulation of the note been entirely in *Pennsylvania*. It is expressed in commercial form, and was negotiable upon commercial principles. On general grounds, therefore, as well as for the particular reasons that have been assigned, I think the judgment of the Court is right: and I should be surprised to find any doubt upon the subject in a great commercial city like *Philadelphia*.

Shippen, *Justice*. It is evident, that on the abstract question, the Court do not agree; nor is it necessary that they should, as we are unanimous in the judgment pronounced, upon the grounds peculiar to this case. If, however, I were called upon to give an opinion, I should incline to the one expressed by Judge *Addison*.

The judgment below reversed; and judgment to be entered for *Daniel Ludlow*, the plaintiff in error. (2)

(2) A question arose, whether this Court should enter the judgment for the plaintiff in error, or merely remit the record to the Supreme Court, that the judgment might be entered there? In the present case, a decision was immaterial, as Mr. *Bingham*, being a mere stake-holder, was ready, at once, to pay the money, on the opinion which had been delivered; but as a precedent it was thought important, and the Court kept the point under advisement till the next adjourned session.

1799.

Johnson, Plaintiff in Error, *versus* Haines's Lessee.

IN error from the Supreme Court.* The question arose upon the following facts, which, by agreement, were to be considered as if found by a special verdict.

"Ejectment for a house and lot in *Germantown*, of which *Rebecca Vanaken* died seised on the 13th of *February* 1797, intestate, and leaving no father, mother, child, grand-child, brother, or sister, living.

"But the intestate had had brothers and sisters, who died under these circumstances:

"1st. *Richard*, who died without issue.

"2d. *Catharine*, who married *Casper Wistar*, and left issue *Richard*, *Margaret*, *Catharine*, *Rebecca*, *Sarah* and *Casper*; of this family *Richard*, *Margaret* and *Rebecca* are dead; but all of them leaving issue.

"3d. *Anne*, who married —— *Lukens* and left issue *John*, *Mary*, *Daniel*, *Derrick* and *Rebecca*; all of this family died in the life of the intestate, but all of them left issue.

"4th. *John*, who died in the life time of the intestate, but left issue *Anthony* (*the plaintiff in error*) *John*, *Joseph* and *Margaret*, and *Margaret* also died in the intestate's life time leaving issue.

"5th. *Margaret*, who intermarried with *Reuben Haines*, and left issue *Casper* (*the lessor of the plaintiff below*) *Catharine*, *Josiah*, and *Reuben*; *Josiah* is dead leaving one son, who is now alive, and *Reuben* is dead without issue.

"It was agreed that *Margaret* the daughter of *Catharine*, who was the sister of *Rebecca*, died in the life time of the intestate.

"And the questions submitted to the Court are, Whether the plaintiff in error is entitled to the whole of the premises? And, if he is not, how the premises are to be divided?"

The plaintiff in error claimed the whole of the premises as heir at law of the intestate; and the lessor of the defendant in error insisted that the premises ought to be divided, on the principles of the Act of the Assembly, directing the descent of intestates' real estates. 3 *vol. Penn. Laws*, 521. *Dall. Edit.*

The ground of the claim of the plaintiff in error was, that the intestate had died leaving the lineal representatives of brothers and sisters, but without leaving a father, or mother, brothers, or sisters; that the partition of real estate was not provided for in such a case of intestacy, by any law existing at the time of the intestate's death; that this being a *casus omissus* in the Act

* There had not been any opinion delivered in this case by the Judges of the Supreme Court; but judgment was entered, by consent of the parties, to expedite the decision of the Court of dernier resort.

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of assembly, the estate must descend to the heir at the common law; and that the legislature had themselves considered it as a *casus omissus*, by passing a supplementary act to provide for it: 4 *vol. Penn. Laws*, 154. (*Dall. edit.*) The first act was passed on the 19th of *April* 1794, the second act was passed on the 4th of *April* 1797; but the intestate died between the dates of those acts, on the 13th of *February* 1797. The following authorities were cited for the plaintiff in error: *Chart. of Penn. s.* 6. 1 *vol. Penn. Laws, in app.* 21. (*Dall. edit.*) *Ibid. p.* 723. *Hale's Com. L.* 148. 2 *Bl. Com.* 504. 3 *Burr.* 1634. 1799.

The defendant in error admitted, that there was no express provision of the act of assembly, passed in 1794, precisely in all its words defining the present case; but contended, that the case was within the general policy of the intestate law, which contemplates, throughout, the partibility of estates; and that construing the law according to the spirit, policy, and intention of the makers, consistently with reason, and the best convenience, the case was necessarily understood, implied, and embraced, in the frame and operation of several of the sections of the law, which were cited and analysed. The following authorities were cited for the defendant in error. 1 *Plowd.* 344. 2 *Plowd.* 414. 1 *Bl. Com.* 87. 10 *Co.* 58. 1 *Dall. Rep.* 351. 175. 1 *Vez.* 421. 2 *Eq. Abr.* 245. 1 *Stra.* 710. 2 *Wils.* 344. *Burn. Ecl. Law*, *Hob.* 346. *Vaugh.* 179. 2 *Vern.* 431. *Plowd.* 467.

The unanimous opinion of the COURT was delivered, to the following effect, by the *Chief Justice*, in the absence of CHEW, *President*.

M'KEAN, *Chief Justice*. The intestate died, leaving the children of several of her brothers and sisters, and a grand-child of one of her brothers: and it is now made a question, whether her real estate shall be divided among these surviving relations, or descend entirely to her heir at law?

By the sixth section of the charter granted to *William Penn*, the laws of *England* "for regulating and governing of property, "as well for the descent and enjoyment of lands, as for the en- "joyment and succession of goods and chattles," were introduced and established in *Pennsylvania*, to continue till they were altered by the legislature of the province. The common law being, therefore, the original guide, and the plaintiff in error being the heir at common law, his title must prevail, unless it shall appear, that an alteration in the rule has been made, by some act of the general assembly.

Now, when the intestate died, there was but one law in existence on the subject, the law of the 19th of *April* 1794; and though the sixth section of that law provides for the case of a person dying intestate, leaving, "neither widow nor lawful issue, but *leaving a father, brothers, and sisters*," it does not provide, nor does any other of the sections provide, for the case of a

1799. person dying intestate, without lawful issue, and leaving *no father, or mother*, brothers, or sisters. The descent of the real estate, in this specific case, was not, therefore, altered, or regulated, by any act of the general assembly, when the estate was vested in the person entitled to take, at the death of the intestate.

It is probable, that if the case had been stated to the legislature, they would have directed the same distribution in the year 1794, that they have since done by the act of the year 1797: and, it is urged, that as there is equal reason for making such a distribution, where no father survives, as where a father does survive, the intestate, the Court ought, upon the obvious principle and policy of the law, to supply the deficiency. But, it must be remembered, that the system of distributing real estates in cases of intestacy, is an encroachment on the common law; and wherever such an encroachment takes away a right, which would otherwise be vested in the heir at law, the operation of the statute should not be extended further, than it is carried by the very words of the legislature.

We are, upon the whole, unanimously, of opinion, that the judgment below should be reversed; and that judgment should be given for the plaintiff in error.

HIGH COURT

OF

ERRORS AND APPEALS

OF

PENNSYLVANIA.

July Session 1799.

Before RUSH,
ADDISON,
RIDDLE,
HENRY and
COXE,
} Presidents of the Circuits of Common Pleas.

Ewing *et Ux.* Plaintiffs in Error, *versus* Houston *et Ux.*

IN error from the Supreme Court. A writ of summons in partition was issued by the plaintiff in error, in the Court of Common Pleas of *York* county, returnable to *September* term 1792, by which the defendant in error was summoned to show wherefore the following property, held by the parties as tenants in common, should not be divided: to wit; "one ferry at the "river *Susquehanna* in *Hellam* township in the county aforesaid, "six messuages, one barn, four stables, four gardens, one or-"chard, 250 acres of arable land, and 371 acres of woodland, "and the usual allowance of six per cent. with the appurte-"nances in the same township of *Hellam*, in the said county of "*York*." The writ being returned, "summoned," both the parties appeared by their attornies, the plaintiffs filed a declaration, setting forth their title, and demanding partition of the same estates that were specified in the writ; and judgment was rendered, by consent, in general terms, "that partition be made." A writ of partition, accordingly issued on this judgment, returnable

1799. turnable to *December* term 1792, when "the sheriff returns the "writ, and that partition hath been made according to the com- "mand thereof;" both the parties appeared by their attornies; and judgment was rendered, "that the partition so made be "confirmed, and be and remain firm and stable forever." The writ of partition recited the words of the writ of summons, except that in describing the place, where the several estates were situated, the recital added the township of *Windsor* to the township of *Hellam*, stating the premises to lie "with the appurte- "nances *in the same township of Hellam and Windsor*, in the "county aforesaid." It then proceeded to recite the judgment, "whereupon it was considered by the said Court, that partition "*thereof* between the parties aforesaid be made:" and concluded with the mandatory clause to the sheriff: "Therefore we com- "mand you that taking with you twelve honest and lawful men "of your bailiwick, &c. in your proper person you go to the said "*ferry*, &c. And there by the oaths or affirmations of the said "twelve men, *in the presence of the parties* aforesaid, by you for "that purpose to be warned (if upon being warned they will at- "tend) and the said six messuages, &c. (specifying all the estates "mentioned in the writ *except the ferry*) with the appurtenances "(having respect to the value thereof) into two equal parts "you cause to be parted and divided, and one of the said "equal parts to the said plaintiffs, &c. and the other equal part "unto the defendants, &c. to hold to them in severalty you "*assign and deliver*, so that neither the said plaintiffs, &c. nor "the said defendants, &c. have more of the said *ferry*, six mes- "suages, &c. with the appurtenances than to them of right "belong or appertain. And the said plaintiffs, &c. their equal "half part thereof to them *allotted*, and the said defendants, &c. "the other equal part thereof to them *allotted*, may hold in seve- "ralty. And that the partition *thereof* so openly and distinctly "by you in form aforesaid made you have before our Judges, "&c." The inquisition held under this writ of partition, after naming the persons constituting the inquest, states "that they "were duly sworn and affirmed to divide and make partition of *one* "*ferry*, at the river *Susquehanna* in the township of *Hellam* and "county of *York* aforesaid, six messuages, &c. with the appur- "tenances *in the same township of Hellam and Windsor* in the "county aforesaid, between the plaintiffs, &c. and the defend- "ants, &c." And after dividing and parting the whole into two equal parts, the inquisition proceeds to a specification, that the inquest "have parted and divided *the said ferry*, messuages, "lands and premises with the appurtenances into two equal "parts, having regard to the true value thereof. And the lot "marked on the annexed draught No. 1. containing *the said ferry* "at the river *Susquehanna*, with all the flats, &c. thereunto be- "longing; the lot marked in the said draught No. 2, &c.; and "the

"the tract of land marked No. 3, &c., *also a fishery on the* 1799.
"*river Susquehanna, at or near the said ferry*, together with each
"and every of their rights, &c. *they have allotted to the said*
"*plaintiffs* their heirs and assigns forever," &c.(1) A writ of error was brought by the plaintiff in the partition on the judgment of the Common Pleas, but that judgment being affirmed by the Supreme Court, the cause was removed into this Court, by the same party.

For the plaintiff in error (who was also the plaintiff in the partition) *Lewis* made the following objections to the proceedings.

1st. That the original writ, declaration, and judgment, only call for a partition of lands *in Hellam township;* but the judicial writ recites the original writ to have been for lands in *Hellam* and *Windsor* townships, and commands a division of them; and the return and final judgment are for lands *in Hellam and Windsor townships*. The declaration, judgment, and execution, must pursue the writ; and if the execution does not pursue the judgment it is a nullity. Execution is obtaining the actual possession of the thing recovered by law; but the lands in *Windsor* township never were recovered. 1 *Inst.* 154. *a. Ibid.* 289. 2 *Bac. Abr.* 329. It is evidently an error of the attorney; but can he correct his errors in this way? The authorities, both in criminal and civil cases, show the contrary; for, although it may not be necessary to name a township, town, street, &c. in the process and pleadings, if they are named, they must be proved. 2 *Hawk. P. C. ch.* 46. *s.* 34. *Salk.* 661. *Bull. N. P.* 89. *Hob.* 37, 8. 2 *Inst.* 513. Is it possible, however, to maintain, that an execution can issue for a greater quantity of lands, or for different lands, than what is recovered by the judgment upon which it is founded? The law is incontestably established, that the slightest variance in the recital of a record, as between the count and the writ, so between the judgment and the execution, is fatal. *Cro. E.* 185. 329, 330. 829. 2 *Lutw.* 1179. 1181. 2 *Vent.* 153. *Gilb. C. B.* 50. 3. 239. Besides, the statutes of *jeoffaille* do not extend to judicial writs, when the party has no day in Court: and under the authority of the present judicial writ, any other lands might as well have been divided, as those demanded in the declaration and recovered by the judgment.

2d. That the original writ, the declaration, and the judgment, are for *a ferry*, six messuages, &c. but the judicial writ omits

(1) Though there was no other description of the fishery, yet the defendant's counsel insisted, that both the ferry and the fishery were appurtenant to lot No. 1; and the assertion seemed to be supported, on an inspection of the draught to which the inquest referred. The ferry was kept on a part of lot No. 1; and the fishery, being located within the boundaries of the same lot, would be "*at or near the ferry.*"

the

1799. *the ferry* in the mandatory clause; and yet the ferry is divided by the inquest, who could only act to the extent of the command and authority in the writ of partition. This, too, is a mistake; but the consequences would be ruinous, indeed, if it could be arbitrarily corrected by the sheriff or the inquest. The sheriff must execute the command of the Court, doing neither more, nor less; as he was not commanded to divide the ferry, he had no authority to do so; and, of course, the division is a nullity. *Hob.* 37, 8. *Moore* 19.

3d. That the inquest have assigned a fishery to the plaintiffs, which never was put in demand; and the defendants sweep the same water. 2 *Bl. Com.* 190, 191. 2 *Keb.* 413. 580.

4th. That it does not appear, on the sheriff's return, that the parties attended, or were warned to attend, the execution of the writ of partition; though this was commanded by the writ, is required by the law, and is recognised by all the precedents.

5th. That the return to the writ of partition does not state that the premises were *assigned and delivered* to the respective parties, as the writ directs; but merely that they were *allotted.*

These objections were answered by *Ingersoll* and *Hopkins*, for the defendant in error, substantially as follows:

1st. That every intendment will be made in favour of a judgment; 2 *Keb.* 413. and it is admitted, that all the proceedings are regular till the issuing of the judicial writ. In the execution of that writ, also, the Court will presume the sheriff has acted lawfully and faithfully till the contrary is shown. But it appears, on a connected view of the record, that the property demanded, is the same property that was divided, the words "same" and "thereof" applying relatively from the first to the last of the process, as designating the same specific property. It is true, that the name of *Windsor* township is first introduced in the judicial writ; but if the introduction is not tolerated as an amendment for the sake of greater certainty, it ought to be disregarded as surplusage. The writ of partition was issued by the plaintiffs, who cannot take advantage of their own error; *Moore*, 692. 5 *Com. Dig.* 301. 3 *Bl. Com.* 16. the judgment on the return, it will be presumed, was rendered at their instance, at least they appeared by an attorney on the record; and there has been a long acquiescence of the parties.

2d. That the ferry, though accidentally omitted in one clause of the judicial writ, is mentioned in other of its clauses, and is contemplated in every part of the record as an object of partition. It belongs to lot No. 1, and may be considered as *appurtenant* to it.

3d. That the fishery was appurtenant to lot No. 1. and was named in the inquest, merely as a matter of detail and specification.

4th. That

4th. That notice to the parties is proved on two grounds; first, because the writ commands it, and the sheriff returns, that he has executed the writ according to the command thereof; and, secondly, because the plaintiffs issued the writ, they were present by attorney when it was returned, and at that time never complained. But even if no notice had been given, there was another remedy; and the objection comes too late on a writ of error. *5 Com.* 301. 1799.

5th. That the writ of partition directs the premises to be divided, assigned and delivered; it is recited in the inquest; and the sheriff returns that he has obeyed the command of the writ. When, therefore, the inquest declare that they have *allotted* the moieties to the respective parties, it must be deemed an allotment according to the terms of the command and authority under which they acted.

On the last day of the session, the COURT mentioned, that some doubts had arisen, which would prevent a decision of the cause till the adjourned session; but that, in the meantime, for their own information, they should direct a *certiorari* to issue to the Court of Common Pleas of *York* county, to inquire whether any precept had been given, authorising the writ of execution, or judicial writ of partition, to issue; and if so, to return it. (2)

Cur. adv. vult.

At an adjourned session, held on the 17th of *January* 1800, the COURT unanimously affirmed the judgment of the Supreme Court.

Judgment affirmed.

Levezey *et al. versus* Gorgas *et al.*

IN error from the Supreme Court. A declaration was filed in the Court below by the plaintiffs in error, against the defendants, in which they set forth, "that on the of 1790, and thence continually, they have been seised in their desmesne as of fee of and in a certain water grist mill with the appurtenances, upon *Wissahicon* creek in *Philadelphia* county; that the defendants all the time aforesaid and still are in possession of a certain other water grist mill with the appurtenances upon the same creek, and below the mill of the plaintiffs; and that the defendants, intending to injure the plaintiffs, had raised their dam

(2) *Lewis* suggested a doubt, whether a *certiorari* could issue, *per saltem*, to the Common Pleas, overleaping the Supreme Court, on whose judgment the writ of error was brought; but he agreed to give effect to any mode, that might be taken to ascertain the fact in question, and to consider any precept that issued, as regularly annexed to the record.

higher,

1799. higher, to wit feet higher than the same had ever been before raised, and thereby unjustly penned back, pent up, and obstructed the water of the said creek between the said mills, insomuch that the water of the creek during all the time aforesaid overflowed and greatly damaged, spoiled, injured, and broke to pieces the said mill of the plaintiffs, to their great damage in their said hereditary estate, and whereby they were forced to expend a large sum, &c. in repairing, &c." The defendants pleaded "not guilty, with leave to alter, and give the special matter in "evidence:" and afterwards "by agreement of attornies in writing filed, all matters in variance between the parties, are referred to *William Ward Burrows*, *Alexander Martin*, *John Holmes* "and *George Eyre*, who shall have full power to award whether "any and what sum shall be paid to the plaintiff by the defendant, "and *vice versa*, to settle their respective claims to the waters of "the *Wissahicon* creek, by fixing what shall be the heighth of "the defendant's dam, and whether any alteration shall be made "therein, and to direct articles to be executed accordingly: the "report of any three to be conclusive." All the referees concurred in filing a report, by which it was found and awarded, "1st. That the defendants their heirs and assigns shall and may "erect and complete the mill-dam to their mill now belonging "of a heighth corresponding with the bottom of the hole now "bored in a certain rock standing and being on the north-east side "of *Wissahicon* creek, near the said mill. And the said dam of "the heighth aforesaid shall and may forever hereafter keep "and maintain. And if the said defendants, their heirs and assigns, or either, or any of them, shall and do wilfully, or negligently, cause or suffer the said dam to be raised higher than "is hereinafter mentioned, then and in such case, it shall be lawful for the plaintiffs their heirs and assigns, to give a written "notice to the defendants their heirs and assigns, requiring them "to reduce the said dam to its proper level, herein before directed: and if the defendants their heirs and assigns, shall neglect or refuse so to do, for thirty days after such notice, the "plaintiffs their heirs and assigns may summon three freeholders, "being indifferent men, to view and examine the same; and if "the said freeholders shall be of opinion that the plaintiff's, &c. "are injured by the said dam being carried up higher than the "level herein directed, they shall give a written notice to the "defendants, &c. requiring them to reduce the said dam to its "proper level; and if within thirty days thereafter, the defendants, "&c. shall not reduce the said dam to its level aforesaid, the "plaintiffs, &c. may lawfully enter upon the said dam, and abate "and prostrate the same. 2d. In consideration of the foregoing "privileges the referees order and award, that the defendants, "&c. holding the said mill, shall yearly, and every year, pay 10*l.* "to the plaintiffs, &c. the first payment to be made on the 31st "of

"of *March* 1797. And also that the defendants do on the 31st "of *March* next pay to the plaintiffs 50*l*., which shall be in full "of all claims and demands on the part of the plaintiffs against "the defendants, on account of the said mill dam. *Lastly*: the "referees award and direct that the said parties respectively, "shall mutually execute and deliver proper deeds and instru- "ments in writing, for the granting, assuring, and confirming, "as well the said privileges hereby awarded to the said defend- "ants, their heirs and assigns, as the said annual payment to the "plaintiffs, &c.: and it is awarded and directed that the parties "divide the costs." On the 21st of *March* 1796, "the report of "the referees was read and confirmed, and judgment *nisi*." On the 22d of *March*, exceptions to the report were filed; but after hearing witnesses, and the argument of counsel, on the 14th of *September* 1796, "the report of the referees and judgment were confirmed": and thereupon the present writ of error was brought. 1799.

On arguing the cause in this Court, *Lewis*, for the plaintiff in error, took the following exceptions to the record:

1st. That the referees had exceeded the authority given by the submission of the parties, inasmuch as they have directed the plaintiffs to sell to the defendants, a certain privilege, and have awarded an annual sum, to be paid by the defendants to the plaintiffs, as the price of the privilege, which were not matters in variance between the parties, nor included in the rule of reference.

2d. That the referees have directed deeds to be executed by the plaintiffs, for assuring to the defendants a new right, not for settling the old rights of the parties (which are alone contemplated in the submission) to the waters of the *Wissahicon*.

3d. That the referees have established a new tribunal for deciding the future controversies of the parties; a power which is inconsistent with the general principles of law, and not supported by the agreement, or submission, of the parties.

4th. That the referees have awarded the parties to divide the costs.

5th. That the judgment in confirmation of the report being entered generally, part of it cannot be affirmed, and part reversed. *Carth.* 235. 2 *Bac. Abr.* 227.

The objections were answered by *Rawle*, for the defendants in error, to the following effect:

1st. That the submission was general, and shows the real points in controversy between the parties: and on the principles of the law of awards in *Pennsylvania*, the present award ought to be enforced. 1 *Dall. Rep.* 364. 314.

2d. That the report, as far as it awards the payment of money, comes strictly within the act of assembly; but on the other two

1799. objects of the report (the grant of the privilege, and the execution of deeds to assure it) there could be no judgment, and they remain in the record as rules of Court, to be enforced by attachment, of which no writ of error lies. 3 *vol. Penn. Laws*, 97. 2 *Bac. Abr.* 215. 3 *Inst.* 31.

3d. That the present record is informally sent up; but it may either be reduced to form by the Court, or they may satisfy their consciences by awarding a *certiorari;* which, however, the defendants in error have no right to isssue. 2 *Bac. Abr.* 204, 5. 3 *Com. Dig.* 166.

4th. That supposing the present record, in all its parts, to be a subject for a writ of error, it is a maxim, that no one can assign that for error, which is for his own advantage. 2 *Bac. Abr.* 220. Thus, the referees find that the defendants are entitled to the privilege, on paying for it; but by way of further security to the plaintiffs, and for their benefit, a summary examination by freeholders is provided, to restrain subsequent encroachments. This is obligatory on the defendants; but it is optional with the plaintiffs, who may have recourse to the ordinary legal remedies.

5th. That the report of the referees does not give any thing new to the defendants. The subject in dispute and submitted, was, whether the defendants had a right to raise their dam; and the referees find that they have such a right, by an old continued compact, paying an equivalent.

6th. That the referees, had power to make an award touching real estate. *Kid.* 34. 133. 136.

On the last day of the session, the COURT mentioned, that they had not been able to form a decisive and satisfactory opinion on the authorities and arguments in this cause; and that, therefore, they would keep it under advisement till the adjourned session. They added, that if the plaintiff in error was to be considered as restrained from pursuing the ordinary remedies of the law, and confined to the remedy prescribed in the report, in case of any future nuisance, or encroachment upon his rights, it was their present sentiment, that the referees had exceeded their authority. The point, however, was not made in the argument before the Supreme Court; and merits further consideration.

Cur. adv. vult.

At an adjourned session, held on the 17th of *January* 1800, the judges delivered their opinions, *seriatim*, but concurred in this general result:

By the COURT: The agreement of the parties constituted the referees, the exclusive judges of the subject submitted to their decision. It gave them, however, no power to delegate their trust and authority to others; nor to erect a new and arbitrary tribunal

tribunal, to determine future controversies. If the first set of referees could proceed in this way, the set empowered by them, might exercise a similar authority; and so *ad infinitum*, compel the parties, without their consent, or controul, to resort to a tribunal unknown to our laws. We are, therefore, unanimously of opinion, that the referees exceeded their authority; and as their report, or award, was confirmed, generally, by the Supreme Court, the judgment of that Court must, also, be generally, reversed. 1799.

Judgment reversed.

HIGH COURT
OF
ERRORS AND APPEALS
OF
PENNSYLVANIA.

January Session 1802.

(1) Present SMITH, and BRACKENRIDGE, } Justices of the Supreme Court; and
COXE, RUSH, and ADDISON, } Presidents of the Circuits of Common Pleas.

Burd, Plaintiff in Error, *versus* Smith, Lessee of Fitzsimons *et al.*

ERROR from the Supreme Court, on a judgment entered in pursuance of the following agreement:

"*Montgomery* county.

"*Richard Smith*, lessee of *Thomas Fitzsimons*, *William* "*M'Mutrie*, *Samuel W. Fisher*, *Philip Nicklin*, and *Isaac* "*Wharton*, v. *Edward Burd.*

"Ejectment for 130 acres of land in *Perkiomen* township, in "*Montgomery* county.

"It is agreed that the above action be entered, as an amicable "action of trespass and ejectment, on the Circuit Court docket of "*Montgomery* county, as of *March* term 1800; that a declara- "tion and pleadings be filed, and issue joined conformably there-

(1) CHEW, *President*, and SHIPPEN, *Chief Justice*, declined sitting in the cause, on account of their connexion with the parties. YEATES (who was, also, connected with the plaintiff in error), HENRY, and RIDDLE, *Justices*, were absent. The sessions of the Court was adjourned, for want of a quorum, from *July* 1801, to the 12th of *January* 1802.

"to;

1802.

"to; that the annexed state of a case be filed as of *June* term "1800, in the nature of a special verdict, with an entry of the "confession of lease entry and ouster; that judgment be ren- "dered thereon for the plaintiff, without prejudice to the title, "or right, of either party; that a writ of error on the said judg- "ment be taken from the Supreme Court, tested as of the last "day of last *December* term of the same Court, and returnable "in the same Court on the first day of *March* term following; "that the said judgment be affirmed, of course, in the said Su- "preme Court, as of the same term, without prejudice to the "right of either party; and that no advantage be taken of any "error in the form of the said proceedings, but every thing be "done to give them validity."

The material facts, contained in the case, to which the agreement refers, were these: "That the title deeds of the land, mentioned in the declaration, were delivered to Mr. *Dallas*, by Mr. *Blair M'Clenachan*, previous to the 2d day of *September* 1797, to enable him to draw a trust deed from *M'Clenachan* to him and Mr. *Huston*; which was, accordingly, drawn, and delivered by Mr. *Dallas* to Mr. *M'Clenachan* for the purpose of having the same executed.

"That on the 2d of *September* 1797, *Blair M'Clenachan* was seised in fee of the premises; and, at the same time, was indebted, on his separate account, and in partnership with *P. Moore* to divers persons (some of whom resided in *Europe*, and in other places beyond seas) in large sums of money, amounting, in the whole, to 435,073 dollars, and upwards. Many of the creditors had commenced suits in the Supreme Court against *Blair M'Clenachan*, and against *M'Clenachan* and *Moore*, which were depending on the said 2d of *September* 1797; in some of them judgments were obtained on the 4th of *September* 1797, to the amount of 216,018 dollars; in others, judgments were obtained in *December* and *March* terms then next following, to the amount of 22,720 dollars; and on the said judgments, or some of them, executions had issued.

"That *Blair M'Clenachan* and *P. Moore*, jointly, or separately, not being able to satisfy and discharge the said debts, *Blair M'Clenachan*, on the 2d of *September* 1797, made and executed a certain indenture for several estates, including the premises in the declaration mentioned, to *A. J. Dallas* and *John H. Huston*, containing (among other things) the following trusts, conditions, and stipulations:

"Upon the special trust and confidence and to the sole intent and "purpose that they the said *Alexander James Dallas* and *John H.* "*Huston* and the survivor of them and the heirs of the survivor "shall sell and dispose of the lands and premises hereby conveyed "and granted in such manner as the said trustees or the survivor "or the heirs of the survivor shall deem most adviseable for the

"general

1802. "general interest of the aforesaid creditors and upon the receipt of "the purchase monies, or securities for the same, the premises so "sold by deed or deeds to grant and convey unto the purchaser "or purchasers thereof in fee simple and that they the said "*Alexander James Dallas* and *John H. Huston* and the survi- "vor of them and the heirs of the survivor shall pay and distri- "bute the monies arising from such sale or sales (after all costs, "charges and expences attending this trust being deducted and "paid) towards the payment and discharge of the debts of all "such the aforesaid creditors, as shall in writing agree to ac- "cept the same within nine months after the date hereof at such "times as the said trustees shall deem the most adviseable, rate- "ably and in proportion according to the whole amount of the "said debts of him the said *Blair M'Clenachan* and of the said "partnership firm of *Blair M'Clenachan* and *Patrick Moore*, and "to pay unto the said *Blair M'Clenachan* his executors, admi- "nistrators, or assigns, the proportion of all such creditors as "shall not signify their acceptance within the specified time to "the intent that he may therewith and thereout compound with "and satisfy such creditors. And if the monies arising from "the sale or sales of the lands and premises aforesaid shall be "more than sufficient to answer the purposes aforesaid, that they "the said *Alexander James Dallas* and *John H. Huston* and "the survivor of them, and the heirs of the survivor shall pay "the overplus monies unto the said *Blair M'Clenachan* his "executors, administrators, or assigns. And the said *Blair* "*M'Clenachan* for himself, his heirs, executors, and administra- "tors doth covenant, promise and agree to and with the said "*Alexander James Dallas* and *John H. Huston* and each of "them and the survivor of them and the heirs and assigns of "them and the survivor of them in manner and form following "that is to say that he the said *Blair M'Clenachan* and his heirs "shall and will from time to time and at all times hereafter upon "the reasonable request and at the proper costs and charges of "them the said *Alexander James Dallas* and *John H. Huston* or "the survivor of them or of the heirs or assigns of them or of "the survivor make execute and deliver or cause to be made, "executed and delivered unto the said *Alexander James Dallas* "and *John H. Huston* or the survivor of them or the heirs or as- "signs of them or of the survivor all such further and other acts "deeds conveyances and assurances in the law whatsoever, for "the better and more perfect granting conveying assuring and "vesting the lands and premises aforesaid in them the said *Alex-* "*ander James Dallas* and *John H. Huston* and the survivor of "them and the heirs and assigns of them and of the survivor upon "the trust and confidence aforesaid as the said *Alexander James* "*Dallas* and *John H. Huston* or the survivor of them or the "heirs or assigns of them or of the survivor or their or either of "their

"their counsel learned in the law shall reasonably devise, advise 1802.
"or require. And the said *Blair M'Clenachan* and his heirs
"the said lands and premises hereby granted or mentioned, or
"intended to be hereby granted with the appurtenances unto the
"said *Alexander James Dallas* and *John H. Huston* and the
"survivor of them and to the heirs and assigns of them and of
"the survivor of them, against him the said *Blair M'Clena-*
"*chan* and his heirs and against all and every other person or
"persons whomsoever lawfully claiming or to claim by from
"or under him them or any or either of them shall and will
"well and truly warrant and forever defend by these presents."
And this indenture was acknowledged on the 4th of *September* 1797, by the said *Blair M'Clenachan*, in the absence of Mr. *Dallas*, one of the trustees, and no proof was given whether the other trustee was present, or not. It was recorded in *Philadelphia* on the 24th of *November*, and in *Montgomery* county, on the 27th of *December*, 1797.

"That the yellow fever prevailed in the city of *Philadelphia* from the latter end of *August*, until the latter end of *October*, or beginning of *November*, 1797; during which the said trustees were absent from the city; but a communication with some of the printers of the city was kept open, during the whole period, by the medium of the post-office.

"That on the said 4th day of *September* 1797 *Edward Burd* (the defendant in the ejectment) obtained a judgment in the Supreme Court, against the said *B. M'Clenachan*, for 5,333 dollars, and 33 cents, besides interest and costs, with a stay of execution for 60 days. A *fi. fa.* was issued and returned upon this judgment, in the usual form to ground a *testatum;* and, on the 15th of *November* 1797, a *testatum fi. fa.* was issued to the sheriff of *Montgomery* county, which was delivered to the sheriff on the next day. On the 24th of *November*, levy was made upon the premises in the declaration mentioned; on the 8th of *December* an inquisition was held on the premises, which were condemned; on the 7th of *March* 1798, a *vend. exponas* issued to the sheriff of *Montgomery*, and the premises were, thereupon, in due form sold to the said *Edward Burd*, for 930*l.*; on the 27th of *March* 1798, the sheriff made, and acknowledged in open Court, a deed for the premises to the said *Edward Burd*; and shortly afterwards delivered to him the possession.

"That the said *Edward Burd* had no knowledge, or notice, of the execution, or existence, of the deed of trust to *Dallas* and *Huston*, or of the proceedings under it, until subsequent to the 12th of *December* 1797.

"That, on the 24th of *November* 1797, the trust deed was in the possession of the trustees, or one of them, by delivery of the said *B. M'Clenachan*; but when the same was so delivered is not known. The other title deeds remained in the possession of

Mr.

1802. Mr. *Dallas* during the yellow fever of 1797, and until they were delivered by him to the lessors of the plaintiff.

"That, on the 15th of *December* 1796, an advertisement was published, calling a meeting of the creditors of *B. M'Clenachan*, and of *M'Clenachan* and *Moore*; and at the meeting, on the 17th of *December*, the creditors appointed a committee, though the minutes of the appointment, &c. were not signed. This committee, on the 19th of *December* 1796, published an advertisement called a caution, against making any purchases, or accepting any conveyances of *B. M'Clenachan*'s estate, from him, or his children; to which *M'Clenachan* published an answer, on the same day; and, on the 21st of *December*, the committee replied.

"That, on the 12th of *December* 1797, Mr. *Huston*, one of the trustees, published a notice of the trust deed, to the creditors of *M'Clenachan*, and *M'Clenachan* and *Moore*; and invited them to give notice of their acceptance in due time. On the 19th of *December*, the creditors met upon the subject, in pursuance of a call published in the papers of the 16th, 18th, and 19th of *December*. At this meeting, the creditors expressed some dissatisfaction, relative to the assignment made as aforesaid to *Dallas* and *Huston*, on a mistaken idea, that it contained a stipulation for a release; and the dissatisfaction went so far, that they determined not to accept the assignment on any such condition. But this mistake being corrected, the committee of the creditors, on the 31st of *May* 1798, gave notice of their acceptance of an interest under the trust; and, on the 4th of *June* following, the trustees assigned the trust estate, including the premises mentioned in the declaration, to the lessors of the plaintiff, who continued to be the committee of the creditors, appointed by the minutes, as abovementioned, and were themselves creditors to a considerable amount. The assignment of the trust was acknowledged on the 9th of *June*, and recorded, in *Philadelphia*, on the 12th of *June* 1798.

"That on the 18th of *March* 1799, *B. M'Clenachan* applied to be discharged as an insolvent debtor; but was remanded by the Court. (2)

The cause was argued, in this Court, during the 12th, 13th, 14th, and 15th of *January* 1802, by *Ingersoll*, *Lewis*, and *M'Kean*, for the plaintiff in error; and by *M. Levy*, *Rawle*, and *Dallas*, for the defendants in error. The immediate question to be decided was, whether, under the circumstances stated, the deed of trust from *M'Clenachan* to *Dallas* and *Huston*, was valid, or void, in relation to the title acquired by the plaintiff in

(2) Mr. *M'Clenachan*, on the first alarm of the failure of *M'Clenachan & Moore* (whose business was left entirely to the management of *Moore*) made several voluntary conveyances to his children; and on this ground, principally, the Supreme Court refused to discharge him as an insolvent debtor.

error:

error? But, incidentally, the discussion embraced the general doctrine of the efficacy of voluntary conveyances by debtors, in trust for the benefit of creditors, upon specific conditions, or stipulations. The points and authorities were as follow: 1802.

For the plaintiff in error. 1st. A voluntary conveyance of the description now under consideration, tends to defraud creditors of the just fruits of legal process. 2 *Bac. Abr.* 601. *Cowp.* 433. And is, therefore, void under the statutes of 13 & 27 *Eliz.* On the face of the deed, it appears to have been intended to defeat judgment creditors; to delay and hinder plaintiffs in their recoveries at law; or, to give it the most favourable construction, the deed was intended to preserve the property for creditors in general, instead of allowing those who were suitors in a Court of law, the advantage due to their meritorious vigilance. 2d. The terms of the trust are indefinite, as to its mode and time of execution, even in favour of the accepting creditors; while, from the very nature and operation of the deed, an interest is reserved for the debtor. Thus, only those who accept the trust, with all its appendages, can receive a benefit from it; and that benefit is confined to a share in the small part only of the debtor's estate, which the deed attempts to convey. Nine months are allowed for an election, to the creditors indiscriminately, during which there could be no distribution, and after the lapse of that period, the debtor is entitled to the share of every non-accepting creditor, as well as to the intermediate perception of the rents, &c. But suppose there was no accepting creditor, did not the property remain in the debtor? It did not pass to the general creditors; and the trustees had paid no consideration for it. 3d. Then, it is a fraud, where there is a conveyance to a trustee for the benefit of a debtor; and the strongest badges of fraud put in the books, are to be found in the present case: for the possession remains in *M'Clenachan*; the trust was not announced, even by recording, till the 24th of *November* 1797; the conveyance was made pending suits, to avoid judgments; the deed is not made to a creditor, but to strangers, of the debtor's own nomination; and the possession of the land was never delivered in pursuance of the deed. *Cowp.* 435. 3 *Co.* 80. 2 *Lev.* 147. Nay, even the deed itself was not delivered to the trustees, for two months after its execution, during which period, *M'Clenachan* might have destroyed it; or he might have sold the land effectually to others, for a valuable consideration. 2 *Vern.* 510. 4th. The acceptance of the creditors was a condition precedent to the raising of a use in their favour; and if no use was so raised, the conveyance to the trustees was merely voluntary, and void by the statute of *Eliz.* against creditors. Besides, the performance of the condition precedent was legally barred, by the lien, which the *testatum* execution had previously secured for the plaintiff

1802. in error. 2 *Bac. Abr.* 608. 1 *Sid.* 133. *Cr. J.* 454. *5 Vin. Abr.* "*Condition.*" 76. *pl.* 20. *Ibid.* 178. *pl.* 37. *Ib.* 89. *pl.* 10. 5th. By the express requisition of the deed of trust, the acceptance of the creditors must be in writing; and, of course, no assent, by implication, can render the use absolute. *Cowp.* 117. 1 *Cha. Ca.* 141. 143. 3 *Co.* 28. *b.* 3 *Co.* 29. It is stated in the case, that the creditors did once refuse to accept; by which they had determined their right of election, and could not afterwards reverse it; particularly so as to affect and destroy the liens of judgment creditors. And even as to the act authorising an acceptance, it is a mere minute of proceedings of a meeting; it is not subscribed by all the creditors at the meeting; and the notice from the committee can only operate, on the terms of the trust, as a notice in writing, for those who actually signed it; since, a *parol* delegation of power to a committee, could not be deemed a performance, *in writing*, of the condition precedent. 6th. The plaintiff in error obtained a lien upon the land by the delivery of the *testatum fi. fa.* to the sheriff on the 16th of *November* 1797; and the acceptance of the creditors, even by their committee, was not sooner than the 31st of *May* 1798. Then, it would be contrary to the principles of equity, and to the rules of law, that the estate thus vested by the execution, should be divested, by a relation from the time of the acceptance, to the date of the trust deed, against a person, who is neither party, nor privy, to the acceptance, or the deed. 3 *Co.* 25. 27. 26. 2 *Vin. Abr.* 285, 286. 288. 287. *pl.* 3. 1 *W. Black. Rep.* 642. *Plawd.* 482. *b.* 2 *Ventr.* 200. 13 *Co.* 21. *a. Finch.* 6. *Style's Pr. Reg.* 367. 18 *Vin. Abr.* 162. *pl.* 1. 5 *Co.* 119. *b.*

For the defendants in error. 1st. The title of the lessors of the plaintiff, arises from a fair and honest transaction; though it would be enough to remark, that the silence of the verdict (as the case must be considered) is a legal negative of the insinuation of fraud. 10 *Co.* 56. And there is a valuable consideration *in law*, for the trust deed, though it is no more than five dollars; which, however, coupled with a fair intention, completely vests the title in the trustees. 2 *Bl. C.* 296. 2d. The statute of 13 *Eliz. c.* 5. secures the rights of creditors, against motives of "malice, fraud, covin, collusion, and guile," by annulling the act which they produce. But if the present case is not so generated, it is not an act within the letter of the statute, "to the "end and purpose to delay, hinder, and defraud creditors, and "others, of their just and lawful actions." In the construction of the statute, it must, also, be remembered, that there is an essential difference between "the end and purpose," of an act, and the consequence and result, which naturally follow it. For, certainly, a creditor, on the eve of obtaining a judgment, may be hindered, or delayed, as the necessary consequence of his debtor's making

making a conveyance of his estate, unquestionably valid, upon a *bonâ fide* sale. To invalidate a conveyance, therefore, there must not only be an intent, which consequentially hinders and delays the creditor; but it must be a covinous and fraudulent intention, to that end and purpose. Giving, therefore, the statute the most liberal construction (and it ought to be liberally construed. *Cowp.* 434.) still the inquiry terminates, in ascertaining whether the conveyance is fraudulent, or not. 10 *Co.* 56. 1 *Cha. Ca.* 291. 1 *Vent.* 194. 1 *Mod.* 119. 1 *Atk.* 15. *Cowp.* 708. 434. 2 *Vez.* 11. 2 *Atk.* 481. And what is fraudulent, depends on the moral intention; on the impulse of the will, to perform the act, which necessarily produces the obnoxious consequence. *Bull. N. P.* 257. By this test, what taint, or colour, of fraud appears in the present case? The object of *M'Clenachan* was not fraudulently to hinder and delay any creditor; but honestly to secure an equal distribution of the property among all the creditors. If the purpose was fair and lawful, the deed contains every formality, that is necessary for carrying it into effect; and on the 2d of *September* 1797 the legal estate was absolutely vested in *Dallas* and *Huston*. 3d. Reviewing, then, the opposite argument, let us give to each point an answer. It is urged, that the conveyance is not of *all M'Clenachan's* property. We answer, that this does not appear from the facts stated; but admitting it to be true, it strips the case of some of the badges of fraud imputed to it; and leaves a fund to which the dissenting creditors might resort for satisfaction. Again: it is urged, that the deed was made to trustees of his own choice. We answer, that there is no authority that declares this to be fraudulent. In the case of General *Stewart's* settlement on Mrs. *Stewart*, though the whole field of legal objection seemed to be travelled over, this obstacle never occurred. But it is of the essence of a voluntary conveyance, that trustees should not be forced on the debtor; and, as it is generally a case of confidence, not of interest, a friend, or a brother, is more naturally resorted to, than a creditor. If, indeed, the trustees were insolvent, or if any collusion could be charged upon them, it might be deemed a ground to suspect, repudiate and annul the act; but the circumstances of the present case exclude every idea of the kind; and a mere possibility of wrong affords no rule for argument. Again: it is urged, that the deed does not let in all creditors, but only such creditors as assent in writing, within a limited period. We answer, that the trust is open to all; *Prec. Ch.* 105. and that even if a particular class of creditors only had been included, the deed would have been valid. Again: it is urged, that the shares of the non-accepting creditors were to be paid to *M'Clenachan*, to enable him to compound with them. We answer, that there is no evidence in this, of a fraudulent intention; for, it is merely an arrangement to pay the same debts, through different hands; that

1802.

1802. that it was a provision, which depended entirely upon the creditors; for, if they accepted, there would be nothing payable to *M'Clenachan*; that *M'Clenachan's* person was still liable to a *ca. sa.* as no release was exacted; and the effect of the arrangement is precisely the same, as would be produced by a *bonâ fide* sale of the premises. 4 *T. Rep.* 166. Again: it is urged, that if the trustees had a right to sell, and did sell, before the creditors assented, and none of them assented in nine months, *M'Clenachan* must receive the whole of the money. We answer, that the objection proves too much; it attacks all voluntary assignments; and, indeed, almost all conveyances. Assent, *ex vi termini*, is a matter subsequent; and trustees never can certainly know, that the creditors will take their dividends. The rule is, that the legal estate must operate; and it vests, in the present instance, to the full extent of selling and conveying the property. If creditors will not then receive, does their refusal work an avoidance of the title of the vendee? The vendee, in fact, and in law, has nothing to do with the creditors, though he is bound to see, that the sale is in execution of the trust. 1 *Vern.* 260. 1 *Vez.* 173. And the creditors may give notice, and afterwards claim. 1 *Vern.* 319. Again: it is urged, that during the period of nine months, the trustees are restrained from making distribution. We answer, that it is proper in all such cases to fix a reasonable period for distribution; and that the bankrupt and the insolvent laws do so, as well as most voluntary conveyances. Whether the period of nine months is reasonable, or not, must be determined; but it is unfair to argue, that the power to fix a *reasonable* period, carries with it a power to fix an unreasonable one. And here, it must be observed, that there is no right reserved by *M'Clenachan* to receive the rent of the premises, during that, or any other, period. But, if the trustees, either as to the sale, or the distribution, were guilty of any *laches*, or irregularity, they might be controuled under the act of 1774. 1 *State Laws*, 690. *Dall. edit.* Again: it is urged, that the possession was not changed. We answer, that the continuance of possession in the debtor, even of chattels (a *fortiori* of real estate) is not, in itself, fraudulent, but evidence of fraud, which may be rebutted. 1 *Ld. Raym.* 286. *Prec. Chan.* 285. 1 *P. Wms.* 321. 2 *T. Rep.* 587. *Cowp.* 435. But the legal possession, or seisin, did pass to the trustees, according to the law of *Pennsylvania*, at the moment of executing the deed. Though no rent is paid, the possession of the lessee, is the possession of the lessor. 3 *Atk.* 469. *Shep. Touch.* 65. *Ambl.* 599. 57. *Rep.* 424, 5. 1 *Eq. Abr.* 149. 1 *Fonbl.* 194. Again: it is urged, that the deed was executed *in secret*, and not delivered to the trustees for sometime after the execution; of which, too, the plaintiff in error had no notice till it was recorded, on the 24th of *November* 1797. We answer, that the execution of a deed does not call for publicity; that the case does not negative the fact, that

that the deed was delivered to the trustees long before the 24th of *November*, but simply states that it was *then* in the possession of one of them; that the deed shows, by inspection, a sealing *and delivering* on the 2d of *September*, and the legal presumption, till the contrary is proved, is, that it remained with the trustees, from the time of the delivery; that the deed was recorded within six months, and thereby became good, even against a purchaser; and that there is no evidence, or suggestion, that the plaintiff in error lost any opportunity of recovering his debt, by the transactions respecting the deed. *Cro. E.* 7. *Sheldon's case. Cro. E.* 483. 1 *P. Wms.* 205. 577. 4th. Having thus reviewed, and answered, the opposite arguments, it remains to consider, in the abstract, whether the execution of the plaintiff in error, so intercepted the interest in the land, as to defeat the trust? From the very nature and operation of a trust, the legal title, an estate in fee, immediately passed from *M'Clenachan* to the trustees. 2 *Bl. Com.* 271. Nothing was left to him, but a contingent equitable interest; if none of the creditors accepted; if only a part of the creditors accepted; or if there should be a surplus of property, after paying all the creditors. This equitable interest attaches to the land, if it is unsold; or it follows the proceeds of a sale, in the hands of the trustees; and this interest, and no more, is subject to the lien of a judgment creditor; *Gilb. Chan.* 230. 2 *P. Wms.* 491. 2 *Vez.* 662. 1 *Eq. Abr.* 325. *Pow. Mortg.* 197. whose *testatum* into *Montgomery* county cannot, in this respect, enlarge his right, or his security, beyond the effect of the judgment, upon lands in *Philadelphia* county. 5th. The right of a debtor to make a voluntary conveyance of his estate, independent of the statutes of bankruptcy, has never before been controverted, in *England*, nor in *Pennsylvania*, even where a preference was given to one, or more, of the creditors, in exclusion of the rest. 1 *Fonbl.* 260. 5 *T. Rep.* 420. 8 *T. Rep.* 521. 530. *Prec. Ch.* 105. 5 *T. Rep.* 530. 532. The insolvent laws annul private family settlements made by a debtor; 1 *vol. State Laws*, 257. 259. 4 *vol.* 270. but as to voluntary assignments, the right to make them, and their validity when made, are expressly recognised. 1 *vol. State Laws*, 690. The practice of making them in various forms is notorious; sometimes on condition of a general release to the debtor; sometimes with a classification of property, according to which the sales must be effected; and sometimes with a classification of creditors, according to which a priority of payment is to be observed. The Courts of *Pennsylvania* have uniformly recognised and supported, voluntary conveyances, of these several descriptions, made *bonâ fide*, and not colourably, with a latent and fraudulent use for the debtor. (1) 1 *Dall. Rep.* 139. 430. 72. 2 *Bl. Com.* 333.

1802.

(1) This was agreed to be law by the counsel, on both sides; and SMITH, *Justice*, (during the argument) declared, that it had been frequently so decided in the Supreme Court.

1 *Co.*

1802. 1 *Co.* 123. 2 *Inst.* 675. 671. 674, 5. 1 *P. Wms.* 278. 1 *Vern.* 250. 10 *Co.* 56. *Cro. E.* 550. 13 *Vin. Abr.* 534. 3 *Ca. Chan.* 85. In *Mather* v. *Pratt et al.* the Supreme Court was of opinion, that the debtor might assign, for the benefit of one half of his creditors, upon condition; and the plaintiff, a creditor, having sued the defendants, the voluntary assignees, without first complying with the condition of the assignment, was non-suited.

The Court, after taking time to deliberate, delivered opinions, *seriatim*, on the 20th of *January* 1802; of which the following is given as a general outline.

SMITH, *Justice*. The question to be decided, is whether the deed of trust is void, or valid, as against the plaintiff in error, upon a just consideration of all the facts, that belong to the case? The ostensible reason, for creating the trust, is a desire to make a fair division of the property among all the creditors of Mr. *M'Clenachan;* and, if this is the real and operative motive, the deed ought to be liberally construed, in order to give it effect: for, equality is equity. There can be no doubt, likewise, of the right of a debtor (and cases may be easily conceived, in which it would be a duty) independent of the bankrupt laws, to give a preference to some of his creditors, in exclusion of the rest; and, from such a preference alone, the Court would not be disposed, hastily, to infer collusion, secret trusts, or meditated frauds. Hence, it is incumbent upon us to support the present deed of trust, unless in its provisions, and in its operation, it is calculated unlawfully to hinder and delay, to deceive and defraud, the creditors of the grantor. The facts stated in the case, do, indeed, acquit Mr. *M'Clenachan* of any intentional, or mental, fraud; but it is a distinct inquiry, and the only one before the Court, whether they constitute a legal fraud; so as to vitiate and destroy the act, without criminating the agent.

We are sufficiently impressed with the magnitude of the subject, in all its aspects; as it regards the immediate claims of a numerous body of creditors, and as it regards the precedent to be established for future times: but, avoiding much extraneous matter, which was introduced into the argument, we shall form our judgments, exclusively, upon the facts contained in the special verdict. We find, then, that, when Mr. *M'Clenachan* purposed to create the present trust, he was oppressed by an immoveable weight of debt. He knew that many suits were instituted against him; that in some of these suits, judgments would certainly be obtained within forty-eight hours; and that in others, the delay of judgment could not exceed a term. The apprehension of these judgments, produced the determination to make an assignment of the estate in trust. But still, if there is nothing unlawful in the mode of effectuating that determination, nothing to justify the suspicion of a latent unlawful purpose, the deed must, as I have

I have said, be sustained. The omissions, as well as the actions, of a man, will often, however, furnish evidence of his motives. In Mr. *M'Clenachan's* situation, why not call a meeting of his creditors? why not appoint some of them trustees? or why not openly state his object to be an equal distribution, and consult those, who were most interested, as to the means of accomplishing that object? From the start, therefore, when things, which ought to have been done in prudence, as well as candor, are not done, we find reason to suppose, that there is something more intended, than is avowed. Again: when the deed is executed, no schedule designating the creditors, or explanatory of the debts and property, is annexed; so that the trustees remained ignorant (though the grantor was not) of the facts, which were essential to the execution of the trust, until Mr. *M'Clenachan's* application to be discharged, as an insolvent debtor, in *March* 1789: and until that period, in fact, the absolute controul of the uses of the trust continued with him. 1802.

But, on the very face of the deed, it is void in law. No debtor has a right to make his own trustees; and the very attempt would, under some circumstances, be considered as an act of bankruptcy. In a conflict between the debtor and his creditors, the trustees would generally prefer his interest; and, it must be remarked, that the character and conduct of the present trustees, cannot regulate the decision of a legal question. The assent of one party, as well as the proposition of the other, is necessary to compleat every contract. *Burr.* 2241. The creditors could have no remedy against the trustees before they assented; and if they did not assent, there was a resulting trust to the grantor, which placed them entirely at his mercy.

It is *petitio principii*, to argue on the ground that Mr. *M'Clenachan* might have sold and dissipated the property: and, particularly, after the caution published by the creditors, a purchaser would have run some risque in concluding this bargain. Lord *Mansfield* somewhere expressly states, that a purchase even for a valuable consideration, but with a view to defeat a judgment creditor, is fraudulent and void.

On these grounds, therefore, that no schedule accompanied, or followed, the deed of trust; that the deed was made without the consent of any of the creditors; and that it contains a resulting trust to the grantor, thereby placing the dissenting creditors in his power; I think the judgment of the Supreme Court ought to be reversed.

BRACKENRIDGE, *Justice.* I think the deed of trust is void for various reasons. 1st. The resulting trust, in case of a dissent, on the part of the creditors, is for the debtor himself. 2d. The time, for sale and distribution of the trust estate, is indefinite. 3d. The trust was not accepted by the trustees; or, at least, by the creditors. 4th. The trustees were appointed by the grantor himself.

1802. himself. 5th. There is no covenant to compel a sale and distribution. 6th. There is no schedule of the creditors, by which the trustees could know, to whom distribution was to be made.

I will add a general observation. It has been said, that a debtor may favour particular creditors. The right has been allowed, perhaps, on a principle of humanity; or in favour of just debts, to exclude debts in law, not strictly *ex debito justitiæ*. But I do not think, that the practice should be encouraged. It is calculated to create confusion, uncertainty, and collusion. I see nothing that will prevent the mischiefs of voluntary settlements, and conveyances, but a general declaration that they are all void, as against creditors. The general consent of creditors might, perhaps, be a ground of exception; but not even that should be admitted, to give retrospective force to a deed, with a view to cut out, and defeat, an intermediate lien.

The judgment of the Supreme Court should be reversed.

RUSH, *Justice*. Although it has been thought expedient to interweave a great variety of facts, into the statement of the case, *now* before the Court, yet the decision rests upon a narrow ground. It is a controversy between the creditors of *B. M'Clenachan*, and the general question turns upon the validity of the deed of the 2d *September* 1797; by which, the premises mentioned in the declaration, and much *other* landed property, were conveyed in trust, to *A. J. Dallas* and *John H. Huston*, to sell and dispose thereof, in such *manner* as they should deem *most adviseable* for the general interest of the creditors; and also that they should *pay and distribute* the monies arising from the sales, *towards the payment* and discharge of the debts, of all such of the creditors, as shall in WRITING, agree to accept the same, *within nine months*, after the date thereof, at *such times*, as the said trustees shall deem most *adviseable*, rateably and in proportion, according to the whole amount of the debts of the said *B. M'Clenachan*; and also, that they the said trustees should pay unto the said *B. M'Clenachan*, his executors, administrators, and assigns, the proportion of *all such creditors*, as shall *not* signify their acceptance, within the specified time, to the intent, that he may *therewith* and *thereout* compound with, and satisfy, *such* creditors.

If this deed be legal and valid, there is an end of the question. The claim of the plaintiff in error must instantly vanish out of sight.

It is therefore proper to inquire,

1st. Is this deed fraudulent or not?

2d. If it be *not* fraudulent, what is the true construction and operation of it?

1st. The construction of all written instruments, is the peculiar and exclusive duty of Courts. They alone decide on the face of a deed,

a deed, whether it be void or not; in which cases, such apparent fraud, is called a fraud in *law*, because it does not depend upon any extrinsic matters of fact, but solely upon the inspection of the instrument, which must necessarily exclude the *motive* of the grantor. 1802.

The deed of *September* 2d, 1797, purports on the face of it, to delay the creditors of their lawful suits, and is, therefore, within the statutes against fraud. Until the expiration of *nine* months, no *distribution* was to be made, nor any creditor paid, however vigilant he might have been. If a debtor may in this mode, and by a device of this sort, frustrate his creditors for *nine* months, where shall the line be drawn? Why not delay his suit for nine *years*, as well as nine months? His right is the same, in *both* cases. As there is no law of the land, that authorises a debtor to pass *an act* of limitation in his own favour, I hope this Court will never do it for him. The conduct of the debtor reduced to plain language is this: I will bid defiance to my creditors, for any *period* I shall think proper to fix; and this *without* their assent or concurrence. I will fix on such trustees as will favour me, by neglecting to advertise till the nine months are nearly expired, in order that a few creditors only, may have notice of the trust, and signify their assent.

In deciding this cause, we are to consider it as a *general* question. The character of the present trustees is to be kept wholly out of view; for though they would act uprightly, there are other trustees that would act differently. Other trustees might advertise within the *last* month, in hopes, that only a few creditors would subscribe, and, consequently, the resulting fund be larger and more beneficial for the *debtor*.

The design of the statutes, is expressly to make void such deeds, as tend to delay and frustrate creditors of their suits. It is not, therefore, material, whether the deed be made to trustees, for the benefit of the *creditors*, *without* their knowledge, if it produce this effect. The *end* shall in no case sanctify the means, and render that legal, which the law has pronounced fraudulent.

In the case before the Court, we have an instance of a man plunged into debt, covered with law suits, overwhelmed with judgments, and others impending over his head, suddenly and secretly, without the knowledge of a *single* creditor, conveying to trustees of his *own* nomination, an immense property, on such terms and in such manner, as he has chosen to prescribe. I cannot conceive any thing more dangerous, than to sanction by a judicial determination, a deed of this description. It will be vesting the debtor with unlimited power at all times over his property, to baffle his creditors, under the specious pretext of paying them.

1802. 1 *Co.* 123. 2 *Inst.* 675. 671. 674, 5. 1 *P. Wms.* 278. 1 *Vern.* 260. 10 *Co.* 56. *Cro. E.* 550. 13 *Vin. Abr.* 554. 3 *Ca. Chan.* 85. In *Mather* v. *Pratt et al.* the Supreme Court was of opinion, that the debtor might assign, for the benefit of one half of his creditors, upon condition; and the plaintiff, a creditor, having sued the defendants, the voluntary assignees, without first complying with the condition of the assignment, was non-suited.

The Court, after taking time to deliberate, delivered opinions, *seriatim*, on the 20th of *January* 1802; of which the following is given as a general outline.

SMITH, *Justice*. The question to be decided, is whether the deed of trust is void, or valid, as against the plaintiff in error, upon a just consideration of all the facts, that belong to the case? The ostensible reason, for creating the trust, is a desire to make a fair division of the property among all the creditors of Mr. *M'Clenachan;* and, if this is the real and operative motive, the deed ought to be liberally construed, in order to give it effect: for, equality is equity. There can be no doubt, likewise, of the right of a debtor (and cases may be easily conceived, in which it would be a duty) independent of the bankrupt laws, to give a preference to some of his creditors, in exclusion of the rest; and, from such a preference alone, the Court would not be disposed, hastily, to infer collusion, secret trusts, or meditated frauds. Hence, it is incumbent upon us to support the present deed of trust, unless in its provisions, and in its operation, it is calculated unlawfully to hinder and delay, to deceive and defraud, the creditors of the grantor. The facts stated in the case, do, indeed, acquit Mr. *M'Clenachan* of any intentional, or mental, fraud; but it is a distinct inquiry, and the only one before the Court, whether they constitute a legal fraud; so as to vitiate and destroy the act, without criminating the agent.

We are sufficiently impressed with the magnitude of the subject, in all its aspects; as it regards the immediate claims of a numerous body of creditors, and as it regards the precedent to be established for future times: but, avoiding much extraneous matter, which was introduced into the argument, we shall form our judgments, exclusively, upon the facts contained in the special verdict. We find, then, that, when Mr. *M'Clenachan* purposed to create the present trust, he was oppressed by an immoveable weight of debt. He knew that many suits were instituted against him; that in some of these suits, judgments would certainly be obtained within forty-eight hours; and that in others, the delay of judgment could not exceed a term. The apprehension of these judgments, produced the determination to make an assignment of the estate in trust. But still, if there is nothing unlawful in the mode of effectuating that determination, nothing to justify the suspicion of a latent unlawful purpose, the deed must, as I have

I have said, be sustained. The omissions, as well as the actions, of a man, will often, however, furnish evidence of his motives. In Mr. *M'Clenachan's* situation, why not call a meeting of his creditors? why not appoint some of them trustees? or why not openly state his object to be an equal distribution, and consult those, who were most interested, as to the means of accomplishing that object? From the start, therefore, when things, which ought to have been done in prudence, as well as candor, are not done, we find reason to suppose, that there is something more intended, than is avowed. Again: when the deed is executed, no schedule designating the creditors, or explanatory of the debts and property, is annexed; so that the trustees remained ignorant (though the grantor was not) of the facts, which were essential to the execution of the trust, until Mr. *M'Clenachan's* application to be discharged, as an insolvent debtor, in *March* 1789: and until that period, in fact, the absolute controul of the uses of the trust continued with him. 1802.

But, on the very face of the deed, it is void in law. No debtor has a right to make his own trustees; and the very attempt would, under some circumstances, be considered as an act of bankruptcy. In a conflict between the debtor and his creditors, the trustees would generally prefer his interest; and, it must be remarked, that the character and conduct of the present trustees, cannot regulate the decision of a legal question. The assent of one party, as well as the proposition of the other, is necessary to compleat every contract. *Burr.* 2241. The creditors could have no remedy against the trustees before they assented; and if they did not assent, there was a resulting trust to the grantor, which placed them entirely at his mercy.

It is *petitio principii*, to argue on the ground that Mr. *M'Clenachan* might have sold and dissipated the property: and, particularly, after the caution published by the creditors, a purchaser would have run some risque in concluding this bargain. Lord *Mansfield* somewhere expressly states, that a purchase even for a valuable consideration, but with a view to defeat a judgment creditor, is fraudulent and void.

On these grounds, therefore, that no schedule accompanied, or followed, the deed of trust; that the deed was made without the consent of any of the creditors; and that it contains a resulting trust to the grantor, thereby placing the dissenting creditors in his power; I think the judgment of the Supreme Court ought to be reversed.

BRACKENRIDGE, *Justice.* I think the deed of trust is void for various reasons. 1st. The resulting trust, in case of a dissent, on the part of the creditors, is for the debtor himself. 2d. The time, for sale and distribution of the trust estate, is indefinite. 3d. The trust was not accepted by the trustees; or, at least, by the creditors. 4th. The trustees were appointed by the grantor himself.

1802. himself. 5th. There is no covenant to compel a sale and distribution. 6th. There is no schedule of the creditors, by which the trustees could know, to whom distribution was to be made.

I will add a general observation. It has been said, that a debtor may favour particular creditors. The right has been allowed, perhaps, on a principle of humanity; or in favour of just debts, to exclude debts in law, not strictly *ex debito justitiæ*. But I do not think, that the practice should be encouraged. It is calculated to create confusion, uncertainty, and collusion. I see nothing that will prevent the mischiefs of voluntary settlements, and conveyances, but a general declaration that they are all void, as against creditors. The general consent of creditors might, perhaps, be a ground of exception; but not even that should be admitted, to give retrospective force to a deed, with a view to cut out, and defeat, an intermediate lien.

The judgment of the Supreme Court should be reversed.

RUSH, *Justice*. Although it has been thought expedient to interweave a great variety of facts, into the statement of the case, *now* before the Court, yet the decision rests upon a narrow ground. It is a controversy between the creditors of *B. M'Clenachan*, and the general question turns upon the validity of the deed of the 2d *September* 1797; by which, the premises mentioned in the declaration, and much *other* landed property, were conveyed in trust, to *A. J. Dallas* and *John H. Huston*, to sell and dispose thereof, in such *manner* as they should deem *most adviseable* for the general interest of the creditors; and also that they should *pay and distribute* the monies arising from the sales, *towards the payment* and discharge of the debts, of all such of the creditors, as shall in WRITING, agree to accept the same, *within nine months*, after the date thereof, at *such times*, as the said trustees shall deem most *adviseable*, rateably and in proportion, according to the whole amount of the debts of the said *B. M'Clenachan*; and also, that they the said trustees should pay unto the said *B. M'Clenachan*, his executors, administrators, and assigns, the proportion of *all such creditors*, as shall *not* signify their acceptance, within the specified time, to the intent, that he may *therewith* and *thereout* compound with, and satisfy, *such* creditors.

If this deed be legal and valid, there is an end of the question. The claim of the plaintiff in error must instantly vanish out of sight.

It is therefore proper to inquire,

1st. Is this deed fraudulent or not?

2d. If it be *not* fraudulent, what is the true construction and operation of it?

1st. The construction of all written instruments, is the peculiar and exclusive duty of Courts. They alone decide on the face of a deed,

a deed, whether it be void or not; in which cases, such apparent fraud, is called a fraud in *law*, because it does not depend upon any extrinsic matters of fact, but solely upon the inspection of the instrument, which must necessarily exclude the *motive* of the grantor. 1802.

The deed of *September* 2d, 1797, purports on the face of it, to delay the creditors of their lawful suits, and is, therefore, within the statutes against fraud. Until the expiration of *nine* months, no *distribution* was to be made, nor any creditor paid, however vigilant he might have been. If a debtor may in this mode, and by a device of this sort, frustrate his creditors for *nine* months, where shall the line be drawn? Why not delay his suit for nine *years*, as well as nine months? His right is the same, in *both* cases. As there is no law of the land, that authorises a debtor to pass *an act* of limitation in his own favour, I hope this Court will never do it for him. The conduct of the debtor reduced to plain language is this: I will bid defiance to my creditors, for any *period* I shall think proper to fix; and this *without* their assent or concurrence. I will fix on such trustees as will favour me, by neglecting to advertise till the nine months are nearly expired, in order that a few creditors only, may have notice of the trust, and signify their assent.

In deciding this cause, we are to consider it as a *general* question. The character of the present trustees is to be kept wholly out of view; for though they would act uprightly, there are other trustees that would act differently. Other trustees might advertise within the *last* month, in hopes, that only a few creditors would subscribe, and, consequently, the resulting fund be larger and more beneficial for the *debtor*.

The design of the statutes, is expressly to make void such deeds, as tend to delay and frustrate creditors of their suits. It is not, therefore, material, whether the deed be made to trustees, for the benefit of the *creditors*, *without* their knowledge, if it produce this effect. The *end* shall in no case sanctify the means, and render that legal, which the law has pronounced fraudulent.

In the case before the Court, we have an instance of a man plunged into debt, covered with law suits, overwhelmed with judgments, and others impending over his head, suddenly and secretly, without the knowledge of a *single* creditor, conveying to trustees of his *own* nomination, an immense property, on such terms and in such manner, as he has chosen to prescribe. I cannot conceive any thing more dangerous, than to sanction by a judicial determination, a deed of this description. It will be vesting the debtor with unlimited power at all times over his property, to baffle his creditors, under the specious pretext of paying them.

1802. A decision of this sort is warranted by no adjudged case in the books. In *Lutwich* v. *Caillaud*, 5 *Term*, 420. all the creditors, except one, approved of the conveyance in trust, and that *one* had never sued Lord *Abington before* the deed was executed. In *Englis* and others, assignees of *Campbell*, a bankrupt, v. *Grant*, it is expressly stated, not only that the *generality* of the creditors assented to the trust, but the conveyance and covenant were with the *creditors* of *Campbell*.

The case of *Neeve* and *Ladbroke*, assignees of *Wilsmore*, v. the executors of *Thomas Wilsmore*, was a conveyance in trust, to *pay* a debt due to *one* of the trustees; without any clause limiting the creditors in point of time, with respect to their demands on the trustees.

From the nature and operation of the deed of the 2d *September* 1797, as well as by the express terms of it, the grantor has reserved an interest in himself, which is an acknowledged badge of fraud. It should be remembered, that this is an unsolicited deed to trustees, with an important resulting trust; the *value and amount* of which, is left entirely in the *discretion* of the trustees. By selling *when* they think adviseable, and by *omitting* to give notice of the trust for seven or eight months, nearly the whole property would, by these means, revert to the grantor.

For these reasons I am of opinion, the deed is fraudulent.

2d. But if it be *not* fraudulent, what are its true operation and construction, in point of law?

It might have happened, and in fact was very near taking place, that the condition on which the deed was to operate, had altogether failed. It was not till the 31st *May* that any of the creditors signified their assent in writing, as the deed required. It is certain, if *no* creditor had ever assented, that the trust would have been defeated, and the estate have continued in the grantor. Until the creditors, therefore, or some *one* of them assented to the deed, it could have no possible operation, so as to accrue to *their* benefit. Until this event, the trustees were seised to the use of *B. M'Clenachan*, and the property remained liable to executions as *his*. Between the 2d day of *September* 1797 and the 31st of *May* following, the title to the premises in question was legally vested in the plaintiff in error, and could never afterwards be divested by any fiction of law.

Upon *both* these grounds I am of opinion, that the judgment of the lower Court should be reversed.

ADDISON, *Justice*. All the points in discussion are reducible to the two questions: 1st. Is the deed of trust valid? 2d. If it is valid, when did it commence its operation?

1st. The deed was executed for an honest purpose; for the sole purpose of making an equal distribution of the property, among all the grantor's creditors; and there is not the slightest symptom of

of meditated fraud, in any part of the transaction. But the motive, and the effect, of setting this deed aside, will be to prefer the exclusive claim of an individual judgment creditor, to the distributive claims of the general creditors; so that by paying him the whole of his debt, they will be deprived of every part of their debts. I think it, therefore, a duty, by every legal and rational presumption, to support, if possible, the deed of trust; and I find no difficulty, in pronouncing it, in the first place, to be a valid deed. 1802.

2d. I am, likewise, of opinion, that the deed took effect from its date. It was susceptible of an honest execution; and it has, in point of fact, been honestly executed. But an honest execution, might have been enforced, if there had been any disposition to evade it. One of the trustees drew the deed, and his name is inserted in it. This was such evidence of an acceptance of the trust, as would be sufficient, with respect to that trustee at least, to enable the creditors to compel him to perform it.

If the deed were framed for an unlawful purpose, or if, in its operation, it must necessarily introduce, dishonest and fraudulent consequences, it ought to be set aside. But this admission does not affect its validity, merely because it tended to delay some creditors. The motive of the party must be weighed. If a deed, which delays and hinders a creditor, is made upon selfish interests, or upon a mere impulse of benevolence, it is within the statute: but a deed made upon a principle of equal justice to all creditors, however it may intercept the views of a particular creditor, is good, in law, equity, and conscience.

I cannot persuade myself to think, that a deed formally made, with such honourable views, can be destroyed by the extrinsic considerations, that the grantor appointed the trustees; that there was no general assent of creditors to the trust; or that a schedule of the creditors was not annexed. And as to the reservation of a contingent interest, or use, for the grantor, it is enough to remark, that it arose out of the nature of the transaction; that it could not take place, but by the negligence of the creditors themselves; and that any attempt of the trustees to favour the grantor improperly, or dishonestly, would be defeated by the powers of a Court of justice.

Upon the whole, therefore, my voice is for affirming the judgment of the Supreme Court.

COXE, *Justice*. I have been led to consider the case, with a double aspect, to ascertain, 1st. Whether the deed is, in itself, a good legal conveyance? And, 2d. Whether the trust created by the deed is such as a Court of equity would support?

1st. We are bound by the facts stated in the case, or special verdict; and there, (independent of the deed itself) no allegation, or suggestion, of fraud can be discovered. Consider the transaction

1802. tion in its progressive steps. The very execution of the deed, (which the case states) imports a delivery; and as the fact is not contradicted, it is a necessary legal presumption, that there was a delivery. The subsequent acknowledgment of the execution, is not inconsistent with this presumption; because it is an acknowledgment before a magistrate, of a previous delivery, for the purpose of placing the deed on record. The pecuniary consideration, though a nominal, is a legal consideration; and this is fortified by the equitable consideration, for which the deed was made, a payment of debts. Then, the acceptance of the trust, to execute it, is, likewise, a matter of legal presumption, from the delivery of the deed to the trustees; and, indeed, any other evidence of acceptance, is seldom to be obtained.

Still, however, the great question recurs: is the deed on the face of it, a fraudulent, or a *boná fide*, conveyance? A candid and just interpretation of the trust must enable us to decide. It is true, that the trustees derive from the deed a power to sell the property, as they deem most adviseable; but this is a discretion to be exercised, expressly, for the general interest of the creditors. It is true, that the trustees are only authorised to distribute the fund, among the creditors, who shall agree, in writing, within nine months, to accept their shares; but the exclusion from a share must be the act, or omission, of the creditor himself. It is true, that the shares of the non-assenting creditors are to be paid to Mr. *M'Clenachan;* but even this payment is to be made, "to "the intent that he may therewith, and thereout, compound with, "and satisfy such creditors." These provisions, however, are the principal sources of objection to the deed itself, as inherent badges of legal fraud. But are there not, on the other hand, unequivocal marks of a fair and lawful trust, that must, at once, obviate and remove such slight and doubtful causes of suspicion? In the first place, there is an equal distribution of all the property conveyed, among all the creditors. In the next place, there is no stipulation for a release in favour of the grantor. And, finally, the creditors, notwithstanding the acceptance of a share in this fund, are left free to pursue every legal remedy, for the recovery of a full satisfaction, against the person, as well as against any other property, of their debtor. It is not to be denied, that the conveyance was made for the very purpose of hindering the lien of future judgments and executions upon the trust property; or, in other words, to preserve the property for an equal distribution among the creditors, instead of leaving it exposed to the priority of judgment creditors alone: but so far from vitiating the deed, so far from justifying the imputation of fraud, this motive has been considered at the bar (and so I consider it) as the best foundation, in law and equity, for the trust. There is no positive statute, there is no rule of the common law, there is no principle of equity, to be traced in the Code of *England*, or of *Pennsylvania*,

sylvania, that would warrant us in declaring this deed void, upon such a view of its intention, and its effect. 1802.

I will consider, however, more particularly, some of the additional objections, that have been made to the validity of the deed, by the counsel for the plaintiff in error. 1st. It is said, that the trust is general: but both in the manner, and in the time, of executing it, the trustees must act conscientiously, or they will incur a responsibility, as for a breach of trust. 2d. It is said, that the assent of the creditors, in writing, within nine months, is a condition precedent, to the investment of the trust. I am rather disposed, however, to treat it as a condition subsequent, for obvious reasons. The legal title passed on the execution of the deed, and the trust immediately attached to the estate. The assent of the creditors must, to be sure, be given afterwards, in order to entitle them to distributive portions of the fund; but how is the assent to be made a condition precedent, in relation to the legal estate, and the trust, both of which were previously established? The trustees might have sold the property, immediately after the execution of the deed, before any assent declared; and as to a declaration of assent *in writing*, this has always been regarded as a non-important part of the proceeding. 3d. It is said, however, that there should, in some form, be an assent of the creditors to the trust, in order to render it valid. A difficulty seems here to have arisen from confounding the particular assent, required by the deed to share in the trust fund; and the presumed assent in law, from the date of the instrument: for, whenever a trust is raised for creditors, their acceptance of it is a legal presumption. Nothing remained in *M'Clenachan* from the execution of the deed, but a mere contingency; and even that contingency, depended entirely upon the act of the creditors. Until the trust was defeated, no judgment, or *testatum* execution, could affect the property; and, consequently, if it was a good subsisting trust on the 2d of *September* 1797, it was good against all subsequent liens. 4th. It is said, that there was not a schedule of creditors annexed to the deed; but although this may be convenient to the execution of the trust, it does not appear to me to be essential to its validity. The trustees might easily have supplied the want of it, by calling a meeting of the creditors. And the nine months allowed for declaring their assent, and making a distribution, seems but a reasonable period, considering the dispersed state of the debts. 5th. It is said, that the payment of the shares of non-assenting creditors to *M'Clenachan*, placed them at his mercy; but suppose the objection to this part of the deed should be well founded, does it follow that the whole deed is void? Shall all the assenting creditors be deprived of their interest, because the dissenting creditors have produced a dilemma, in the appropriation of a part of the trust fund? I would rather say, that the trust is *bonâ fide* and operative, as to the assenting creditors; but void in

1802. in its modification, as to the shares of the dissenting creditors. 5 *T. Rep.* 432. 4.

2d. It is my opinion, likewise, that the trust, created by this deed, would be supported and enforced in a Court of equity. A condition subsequent (as I consider the assent in writing of the creditors to be) is seldom literally enforced in a Court of equity; which looks only to the substance of the trust. For instance, either by negligence, or owing to the public calamity of the yellow fever, three months elapsed before the deed of trust was advertised; but Chancery (where time, not being the material point, is often enlarged) would not allow this period to be lost to the creditors. It is not probable, therefore, that there would be an outstanding creditor, in such a case, as the present; and, at all events, so remote a probability ought not affect the decision. A Court of equity could, I think, mould all the powers and forms of the trust, so as to do complete justice to the parties. And what a Court of equity would do, the Judges of *Pennsylvania*, deciding upon a subject of equity jurisdiction, are in the uniform practice of doing.

For these reasons, I am of opinion, that the judgment of the Supreme Court, ought to be affirmed.

By the COURT, however,

Let the judgment be reversed.

HIGH COURT
OF
ERRORS AND APPEALS
OF
PENNSYLVANIA.

January Session 1804.

Present CHEW, President of this Court.
RUSH, RIDDLE, HENRY, and ROBERTS, } Presidents of the Circuits of Common Pleas.

Lea, Executrix, *et al. versus* Yard.

Hazlehurst *et al. versus* Dallas, Secretary of the Commonwealth.

ERROR from the Supreme Court of *Pennsylvania*. These actions depended, chiefly, on the same facts, and principles; and were argued together, both in the Supreme Court, and in this Court. The facts were these:

John Chaloner was appointed an auctioneer for the city of *Philadelphia*, on the 1st of *August* 1791, and gave a bond to the secretary of the commonwealth, in the penal sum of 2000*l*., with two sureties, namely, *Leonard Dorsey*, and *Thomas Lea*, who are both since dead. *Richard S. Footman* was, also, appointed an auctioneer on the 9th of *June* 1795; and gave a similar bond, with *Isaac Hazlehurst*, and *John D. Coxe*, as his sureties. The conditions of the bonds were of the following tenor:

In *Chaloner's* case: "*Whereas* the above bounden *John Chaloner* was on the first instant re-appointed auctioneer, with authority to make sales by auction at any place or places within the

1804. "the city of *Philadelphia*, the district of *Southwark*, or the town-
"ship of the *Northern Liberties*, or *Moyamensing*, according to
"law: *Now* the condition of this obligation is such, that if the
"said *John Chaloner* shall well and faithfully execute the afore-
"said office of auctioneer according to law; and shall from time
"to time well and truly account for all public monies, which
"shall come into his hands, and pay the same into the treasury
"of the state, agreeably to the directions of the several acts of
"assembly of this commonwealth, which relate to auctions and
"auctioneers; then the above obligation to be void, and of none
"effect, or to be and remain in full force and virtue."

In *Footman's* case: "*Whereas* by a commission bearing even
"date with the above written obligation, the above bounden *R.*
"*S. Footman* has been duly appointed one of the public auction-
"eers in and for the city of *Philadelphia*: *Now* the condition of
"this obligation is such, that if the above bounden *R. S. Foot-*
"*man* shall well and faithfully discharge and perform all the du-
"ties of an auctioneer, and in all things truly and fully comply
"with, and execute the laws relating to the office of auctioneer,
"then the above written obligation to be void, otherwise to be
"and remain in full force and virtue."

While these bonds, respectively, were in force, Mr. *James Yard* delivered to *Chaloner*, as public auctioneer, a considerable quantity of goods to be sold for him. The goods were, accordingly, sold; but *Chaloner* retained 5,011 dollars of the proceeds, which he never paid over, or accounted for, to Mr. *Yard*. And, at the same time, he was considerably indebted to the state, for duties received upon sales at auction. Mrs. *Gapper*, in like manner, delivered to *Footman*, as a public auctioneer, a quantity of goods to be sold for her; which were, accordingly, sold; but the proceeds never accounted for; although *Footman* had punctually paid into the state treasury, all the duties, which he had collected.

Chaloner being dead, an action was brought upon his bond, against his executors, &c. for the use of the commonwealth, in which judgment was rendered, and the amount of the duties (being less than the penalty) was recovered. (1) Mr. *Yard*, thereupon, issued a *scire facias*, returnable to *December* term 1798, against the executors of *Thomas Lea*, one of *Chaloner's* sureties; while Mrs. *Gapper* instituted a suit upon *Footman's* bond, in the name of the secretary of the commonwealth, for her use. Cases, comprising the foregoing facts (*redenda singula singulis*) were filed in the actions respectively, with an agreement to consider them as special verdicts, for the purpose of a writ of error; and the general question submitted to the Court, was, Whether an auctioneer's bond is a security for his private customers, as well as for the payment of the duties to the state?

(1) See 3 *Dall. Rep.* 500.

After

After argument, the opinion of the Supreme Court, was delivered, *seriatim*, on the 24th of *March* 1803, by SMITH and BRACKENRIDGE, *Justices*, (*Chief Justice* SHIPPEN, and YEATES, *Justice*, declining to take a part in the decision, on account of their relationship to the defendants) conformably to which, judgment was entered for the plaintiff, in both suits: (1) And writs of error were brought upon these judgments. 1804.

The

(1) I have been favoured with a note of what was said by the Judges: from which, in substance, may be collected the following principles.

SMITH, *Justice*. This is strongly pressed as a case of sureties, against whom an obligation ought never, it is said, to be extended, beyond the strict letter. 2 *T. Rep.* 370. But, the truth is, that where there is a joint obligation, the law does not, abstractedly, recognise the character of a surety: and, after all, sureties must be bound, according to *the true construction* of the obligation, whatever may be the form of the expression. 1 *Br. Ch.* 87.

The essential question, therefore, is, to what duties, does the condition of the bond refer? It is a general rule, resulting from a view of our whole official system, that where an officer gives a bond for the performance of his duties, it shall operate to protect the individuals, who are obliged by the law, to resort to his office, as well as the public, by whom he is appointed. From many instances, it is sufficient to mention those of sheriffs, coroners, and surveyors. The instance of an auctioneer, independent of the positive provisions of the statute, seems, at least, to be, as much as any other, within the reason, principle, and policy, of the rule. He is a public agent, with an exclusive authority to sell at vendue. Individuals cannot employ any other agent for the purpose of selling their goods; and it is the uniform practice to leave to him, too, the collection of the purchase money. Indeed, I cannot perceive how the owner of the goods could consistently with the various provisions of the laws, maintain an action against the vendee, for the price, in his own name. I grant, that the general rule is, that he who sells by another, is in contemplation of law, the seller himself, with the right of action to recover the price: but that rule applies only, where the owner of the goods may chuse his agent, and not where he is obliged to employ the agent of the public. 2 *Stra.* 1182. Inconveniences might easily be suggested, arising from the opposite doctrine. Auctioneers often advance money on goods sent for sale: would it be just that the owner should still have the power to demand and recover the price, from the purchaser? On a sale, the state acquires a right to the duty, as well as the owner to the purchase money: shall the owner be allowed to recover the duty, as well as the price; or must the vendee be exposed to two demands, and two suits? If, then, upon motives of public policy, a public agent is imposed on the citizens for the sale of their goods, nothing but express words would warrant our supposing, that the legislature, while they took a bond to protect the collection of a small revenue, meant to leave unprotected, so great an amount of private property.

The very smallness of the penalty of the bond, has, however, been urged as an argument, to show, that it could not be the intention of the legislature, to embrace the interests of individuals, as well as the rights of the state. To this objection, I answer: 1st. That, in proportion to the responsibility, the penalty is larger, than in the case of sheriffs' bonds. 2d. That there are several auctioneers, each giving a bond in the same sum; and the vendor may consider which of them, and his sureties, may be most safely entrusted. 3d. That by the condition of the auctioneer's bond, the sums collected, are to be immediately paid over; whereas, in the case of a sheriff, the monies levied may be retained for a considerable time.

Upon the whole, I think judgment must be rendered for the plaintiff.

BRACKENRIDGE, *Justice*. The act of the 23d of *September* 1780, is the first that reserves a *per centum* for the state, on sales at auction: but it will not be said, that adding to the duties of the auctioneer, diminished the effect of the

1804. The case was argued on the 16th, 17th, 18th, and 19th of *January* 1804, by *M. Levy*, *E. Tilghman*, and *Ingersoll*, for the plaintiffs in error, and by *Lewis*, *Rawle*, *S. Levy*, and *Dallas*, for the defendants in error. And, in the course of the argument, both sides referred to the following sections, of the several acts of the general assembly, relative to auctions.

1st. An act was passed on the 14th of *February* 1729, (1 *State Laws*, 154. *Gall. edit.*) "for regulating pedlars, vendues, &c." The preamble recites, "Whereas of late many idle and vagrant "persons are come into this province, and, under pretence of "being hawkers or pedlars, and carrying goods from house to "house within this province to sell, have greatly imposed upon "many people, as well in the quality as in the price of the goods, "and under colour of selling their wares and merchandizes, "have entered into the houses of many honest and sober people, "in the absence of the owner, or owners, of the said houses, "and committed felonies and other misdemeanors, to the great "prejudice of the inhabitants of this province. For remedying "of which inconveniences, and preventing such evil practices, "and to the intent that no persons may be admitted to follow "the business of hawkers and pedlars within this province, but "persons of known honesty, and civil behaviour," &c. The sixth section of the act provided, "That no person, or persons "whatsoever, except as hereinafter is excepted, shall, after the "publication of this act, take upon him, her, or themselves, to "sell, or expose to sale, *by way of vendue*, *or auction*, any wares, "goods, or merchandizes, within the city of *Philadelphia*, unless "such person, or persons, shall be recommended by the mayor, "recorder, and aldermen of the said city of *Philadelphia*, in "their open sessions, to the governor of this province; and shall "have given security to the mayor of the said city, for the time "being, *for the use of the corporation*, in such sum as shall be "agreed upon by the said mayor, &c. provided the same do "not exceed the sum 500*l.*, *for his or their honest and due*

obligation. Every duty, which an auctioneer is bound to perform, is embraced in the terms of the condition; and paying over the proceeds of the sales to his employers, is expressly a duty.

The reduction of the penalty of the bond from 20,000*l.* to 2,000*l.*, might raise a presumption, that when a revenue was contemplated, the revenue only was to be protected; were not that circumstance rebutted, by considering the relative value of money, at the two periods of passing the laws.

Then, the auctioneer is a pubic agent, who must be employed to sell goods at public vendue. He is not only the exclusive agent to sell; but the law, obviously, makes him the exclusive agent to collect the amount of the sales: the owner of the goods cannot forbid the payment to the auctioneer, and recover the purchase money himself. In such a state of things, it is reasonable and just, that the law should protect the private citizens, who are compelled to trust a public agent, in this, as well as in any other, instance; and although the penalty is small, it is in my view a positive provision to protect the customers of the auctioneer, as well as the revenue of the public.

Judgment must be for the plaintiff.

"*execution*

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"*execution of the office of vendue-master within the city of Phila-*
"*delphia, and for the due observation of the ordinances of the said*
"*city, touching the regulating vendues, or public sales, or auctions,*
"*within the same.*"

2d. An act was passed on the 26th of *November* 1779 (2 *State Laws*, 245. *M'Kean's edit.*) "for the effectual suppression of "public auctions and vendues, &c." to expire at the termination of the war. It provides for the appointment of a single "auctioneer of the city of *Philadelphia*;" and the 9th section declares, "that the said auctioneer shall, before he enters "upon the duties of his office, become bound with two sufficient "sureties, unto the president of the supreme executive council "of this state, in the sum of 20,000*l.*, *conditioned for the faith-*"*ful performance of the duties required of him, and for the honest*"*and just satisfaction and payment of his employers, and every*"*one of them.* And besides the usual attestation required of the "officers of this state by law, shall take an oath that he will, to "the best of his skill and abilities, faithfully perform and execute "the duties required of him by this act."

3d. An act was passed on the 23d of *September* 1780 (2 *State Laws*, 406. *M'Kean's edit.*) "to alter and amend," the preceeding act; by the 2d section of which, the appointment of three auctioneers is authorised, "who shall continue for and during "the will and pleasure of president, &c. and shall give bond to "the president and his successors, with two sufficient sureties, "in the sum of 20,000*l.* *for the faithful discharge of their duties,*"*and for well and truly performing the terms and payments in*"*and by this act directed and required:*" by the 3d section it is provided, that the said auctioneers shall have an exclusive right to sell by public vendue, "*rendering and paying to the state trea-*"*surer, for the use of the commonwealth, one per centum of the*"*gross amount of the sales*, so by him, or them, made as afore-"said, in manner following, that is to say; that each and every "of the said auctioneers, shall once in every three months render "an account upon oath to the said treasurer, &c. of all the effects "and property by him sold at any time before the said time of "rendering the same account, and since his last settlement, and "shall then immediately pay to the same treasurer the full amount "of the said one pound in the hundred pounds upon the same "account. And upon any failure in rendering the same account "upon oath, or of payment of the said sum of one *per centum*, "any auctioneer so failing, or neglecting, shall be discharged "from his place, and the said bond put immediately in suit:" And by the 8th section, it is provided, that the fees or recompense of the auctioneers, "*for selling at public auction, collecting*"*the money, and paying over the same without loss or waste*, shall "be, &c." a *per centage*, more or less, according to the nature of the specified articles.

4th. An

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4th. An act was passed on the 13th of *April* 1782 (2 *vol. State Laws, Dall. edit.*) by which the compensation of the auctioneers was reduced, "for their expences and trouble in selling any pro- "perty at public auction, collecting the money and paying over "the same without loss;" an additional one *per centum* was charged on the gross sales, for the use of the commonwealth, to be accounted for and paid over, as the preceding law directs, under the penalty therein mentioned; and it was declared, "that the several "bonds given by the said auctioneers to the president, *for the "faithful performance of the duties of them required by the afore- "said act, shall be a security for the payment of the one per centum "imposed by this act.*"

5th. An act was passed on the 9th of *December* 1783 (2 *State Laws*, 169. *Dall. edit.*) by which the previous acts (with certain exceptions) were made perpetual; auctioneers were prohibited from buying, at public sales, on their own account; and, it was repeated, that if an auctioneer failed or neglected to account, he should be discharged from his place, and his bond put in suit.

6th. An act was passed on the 19th of *March* 1789 (2 *vol. State Laws*, 680. *Dall. edit.*) by which the appointment of an auctioneer for *Moyamensing* was authorised, who should give bond, with two sufficient sureties, in the sum of 2000*l.*, "*for the "faithful discharge of his duty, and for well and truly perform- "ing the terms and payments in and by this act, and the several "acts of general assembly, to which this is a supplement, directed "and required.*"

7th. An act was passed on the 27th of *March* 1790 (2 *vol. State Laws*, 777. *Dall. edit.*) reducing the duty on sales to one *per cent.*, and authorising the appointment of two additional auctioneers, who shall give bond "with two or more sufficient sure- "ties, in the sum of 2000*l.*, *conditioned for the faithful discharge "of their and every of their respective duties, and for well and "truly performing the terms and payments in and by this act, "and the several acts of general assembly to which this is a sup- "plement, directed and required.*"

8th. An act was passed on the 26th of *February* 1791, (3 *State Laws*, 91. *Dall. edit.*) by which the restriction upon the auctioneers to sell goods only within the districts, for which they were respectively appointed, was repealed and annulled.(1)

For the plaintiff in error. 1st. It is proper to premise, that the present suits are instituted against sureties, after the principals are insolvent and dead. And, independent of any peculiar hard-

(1) It may be proper, after this recapitulation, to observe, that the conditions of the bonds, in the present cases, were not drawn strictly in the terms of the acts of assembly; but it was agreed, to argue and decide the general question, independent of any objection, that might be made to the form of the bonds.

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ship in this case, it is a rule of law, as well as of equity, that the responsibility of a surety, shall never be extended beyond the strict letter of his contract. 2 *T. Rep.* 370. 2 *Wils.* 379. 4 *Vez. jr.* 788. Nor is the contract to be regarded in the same rigor, as if it had been expressed by the parties themselves, in their own terms; instead of being prescribed by a legislative act. In such a case, the meaning of the terms employed by the legislature, should be unequivocal, plain, and clear, before it is adopted, as the meaning of the surety, to bind him in a manner so injurious and oppressive. 2d. The acts of the assembly of the year 1780, 1782, 1783, 1789, and 1790, were in force, when these auctioneers were appointed; they direct that bonds shall be given, and they prescribe the terms of the condition of the bonds; but they do not expressly, in any instance, declare the bonds to be a security for private customers. From the year 1729, until the 26th of *November* 1779, although several acts were in force to regulate sales at public vendue, there is, likewise, no express provision to be found, declaring the bond of an auctioneer to be for the use of the individuals, who employed him. Then, the only act, in the whole of the system, with all its successive modifications, by which the bond is expressly appropriated to the protection of an injured customer, is the act of the 26th of *November* 1779. 3d. The act of the 26th of *November* 1779, by *adding* to a provision, "for the faithful performance of the duties required of "the auctioneer," a provision "for the honest and just satisfac- "tion and payment of his employers, and every one of them;" shows it to be the sense of the legislature, that the expressions of the former, would not embrace the objects of the latter provision. 4th. The duration of the act of the 26th of *November* 1779, was limited, by its own terms, to the continuance of the war, and the limitation, of course affected the supplemental acts of 1780, and 1782; but the act of the 9th of *December* 1783, rendered the supplements perpetual, and so much of the act of 1779, as was not thereby altered, or supplied. Then, it is to be considered, that the act of 1780, made expressly "to alter and "amend" the act of 1779, not only increases the number of auctioneers, but prescribes a new condition to be annexed to their bonds; to wit; "for the faithful discharge of their duties, and "for well and truly performing the terms and payments in, and "by this act directed and required," totally omitting the passage in the condition before prescribed, "for the honest and just satis- "faction and payment of the employers," of the auctioneer. 5th. The terms of the condition prescribed in the act of 1780, supplied and superseded the terms of the condition in the act of 1779; they do not mean the same thing, and particularly, they do not both embrace the rights of the individual employers, as well as the rights of the public. Thus, the *duties* referred to by the act of 1780, are the duty of keeping a regular register of horses, and

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1804. and of accounting to the state; and of acting fairly between buyer and seller; while "the terms and payments" required to be performed, are those which are, specifically, directed and required "in and by *this act*;" and the act no where directs or requires a payment to the employers but only to the public. It is true, that the act of 1780, as well as the act of 1779, declares, that, "for "selling at public auction, collecting the money, and paying "over the same without loss or waste," the auctioneer shall be allowed a per centage; but there is in this provision no duty prescribed, no terms and payments stipulated; nothing that relates to a surety, or can affect him: it is merely an enumeration of the services to be performed, by the agent, in consideration of the compensation which the law allows him to demand and receive. 6th. The legislative intention to limit the operation of the bond to a governmental security, may be fairly inferred from a variety of considerations: the smallness of the penalty; the change of expression, to exclude as it were, the opposite construction, when a public duty was first imposed by the act of 1780; the increase of the number of auctioneers, which gave individuals a selection, and so far rendered a provision in their favour unnecessary; the express provision uniformly made for individuals by the legislature in every other case of an official bond; and, finally, the general understanding of the bar, expressed in various opinions given upon the case of Major *Boyd*. 3 *State Laws*. 131. *Dall. edit*. 7th. It is not a sufficient answer to these arguments, that auctioneers are public agents, possessing a monopoly of the sales at public vendue, to whom private citizens are obliged to resort; and, therefore, ought to be protected. In the first place, the regulations of the acts, though they compel individuals to employ the public auctioneer, do not prevent a special contract between them, as to the collection of monies, nor even as to the rate of compensation. Besides, it is not true, that the acts expressly empower the auctioneers alone to collect the proceeds of sales; and the general rule of law is well established, that where the dissenting principal declares himself, a vendee cannot be discharged by a payment to the agent. 2 *Vez*. 221. Even in the case of a compulsive agency, if the employer pays the duty and commissions to the auctioneer, he may sue the vendee for the purchase money. 7 *T. Rep*. 359. And in some cases, a contrary doctrine would be iniquitous: for, suppose the auctioneer becomes bankrupt, before the money is collected; may his assignees collect the money, and put the employer to a dividend? Or, suppose the sales are made for approved notes, at distant periods, shall it be deemed right and lawful, that the auctioneer shall take the notes, and hold them, or use them, at the risque of the employer, till the credit is expired; and, possibly, till the money is recovered upon them in an action at law!

For

For the defendants in error. 1st. The general question is, whether the official bond of an auctioneer, is a security for his fidelity towards individuals, as well as towards the public? On this question, whatever is the meaning of the legislature in the acts of assembly, is the meaning of the parties in the bond. Both principal and surety are bound, according to that meaning; and beyond it neither of them is bound. The only distinction here between the principal and surety is, that the principal may be liable either at common law, or on the bond; but the surety can only be liable on the bond. 2 *T. Rep.* 105. 1 *H. Black.* 186. On the *true construction* of the bond, however, the surety, as well as the principal, would be liable, even beyond the direct letter (though the present case requires it not). 4 *B. P. C.* 87. And the *obiter dicta* of *Buller* in 2 *T. Rep.* 370. must be explained by the subject matter; while the authority of 2 *Wils.* 379. yields to the contrary decision in 1 *T. Rep.* 291. 2d. Under every modification of the office, duties, and bonds, of auctioneers, the legislature *meant* to protect the customers that employed them, as well as the government that appointed them. On principle, it must be meant, since the legislature takes from private individuals the right of chusing their own agents; and, from analogy to other public officers, it must be meant; for, there is not a single instance in the whole of our code, where an official bond is not, either by express words, or the established, practical, construction, held to afford remedy and relief to injured private persons; as in the cases of sheriffs, coroners, administrators, &c. *Cowp.* 140. (against *Ambl.* 183.) 3 *Atk.* 248. 2 *Inst.* 650. *Vaugh.* 334. 12 *Co.* 30. *b.* But the same meaning is clearly, and necessarily derived, from the words of the legislature, in the acts under immediate discussion. Thus, the act of 1729, was passed, because street vendues, &c. had become a nuisance; no revenue, or other public object, than to ensure fair dealing, was contemplated; and the condition of the bond was simply "for the honest and due execution of the office." No other *honesty*, or *duty*, could be in view here, than *honesty* and *duty* towards the customers of the auctioneer. True, the bond was given for the use of the corporation, and the customers had no personal remedy upon it; but still it operated as a penalty for their protection; and if the auctioneer was dishonest, or failed, in any way, to do his duty, the forfeiture was absolute under the act of 1729; while it is now contended, that under the act of 1780, so far as security is concerned, if he is honest to the public, there can be no forfeiture of the official bond, let him be ever so fraudulent towards the private citizen. The act of 1779 confirms expressly the legislative meaning to be in favour of giving a security to the employers of auctioneers, both in the terms of the condition of the bond, and the oath of the auctioneer; and although the phraseology is changed, the substance of the provisions remain the same; "an

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1804. *honest* and *due* execution of the office," under the act of 1729, certainly including "an honest and just satisfaction and payment of the employers," as well as a performance of the general duties of the office. But in the act of 1779 "the use for the corporation," is discontinued; no other use of the official bond is declared; the penalty, reduced by the scale of depreciation, is nearly the same as before; certain duties are prescribed in the 9th and 10th sections (such as a search for offenders, and collecting and paying over the proceeds of sales) but even under this act no duty is contemplated to be raised, on sales at auction. Then, the essential inquiry rests on the act of 1780, which, as well as all the subsequent acts, passed, *not to repeal*, but to alter, amend, supply, or enlarge, the provisions of the act of 1779; and being, *in pari materia*, must be considered together, in order to ascertain the true meaning of the system. The act of 1780, is the first that contemplates a revenue from sales at auction; but, independent of the provisions to secure the revenue, it continues, in substance, the provisions to protect the employers; particularly making it a duty, on which the right of compensation arises, to collect the proceeds of sales, "and pay over the same, without loss, or waste." But it is urged, that the act of 1780, when it prescribes the condition of the bond, omits entirely the previous stipulation, "for the honest and just satisfaction and payment of employers;" and claims from auctioneers only "the faithful "discharge of their duties, and well and truly performing the "terms and payments, in and by this act directed and required." The omission suggested, was correct; for, in the previous act, the stipulation was tautologous and surplusage; as *the duties* of the auctioneer (which he was bound to perform) were emphatically to collect the money and make payment to his employers, no revenue being at that time in contemplation. The appointment of the auctioneer, fixes his duties, as does the appointment of a sheriff, &c. without specification, or detail. Selling, collecting, and paying, form the great outline of those duties. The first and second are common both to the state, and to individuals; and, as to the third, it branches into a payment of the tax to the state, and of the purchase money to the individuals. Besides, "the terms and payments directed and required in and by this act," are, also, to be performed; and the payment to the employer is required by the act, as well as the payment to the state. In short, the two members of the condition of the present bond, fortifying and sustaining each other, must embrace all the duties, all the obligations, which the laws impose upon an auctioneer, or the meaning will be constrained, and inconsistent with the general import of the words. 3d. But in opposition to the meaning of the legislature thus deduced, every kind of inference is offered, as well from the silence, as the expression, of the laws. It is said, that neither principal or surety are liable to the employer, for

for a performance of their duty to him; because the act of 1780, and the subsequent acts, do not say so expressly, as the act of 1779 did; and because the penalty of the bond is inadequate to afford an indemnity for the injury to which, we contend, it applies. If, therefore, the words omitted had been retained, the controversy must so far have ceased; and the only question is, whether words equipotent, or even more extensive for the object, are not employed. But as to the second difficulty, it sounds in this absurdity, that because the bond is not sufficient to protect the employer entirely, it shall not protect him at all. Is the sheriff's bond, is a surveyor's bond, is every administration bond, found commensurate with the possible delinquency, or defalcation? And is it conceivable, that because a surety is called on for less than the loss, that, therefore, he is to pay nothing? But, the truth is, that the sum is more adequate now, than under the act of 1779, when its application to the relief of the employer, is admitted. It is raised from the scaled value of 518*l.* (on 20,000*l.* at 38½ for one) to the specie value of 2000*l.* The increase of the number of auctioneers, virtually augments the fund for the indemnity of individuals; the restriction to sell in their respective districts (while in force) limited the quantum of custom of each auctioneer; and the obligation to account quarterly with the state, under the penalty of an immediate dismission from office, reduced the demand of the state for an indemnity to a mere possibility. Neither the first tax of one per cent., nor its subsequent accumulations, could, under such circumstances, require the protection of a penalty of 2000*l.* from six auctioneers. *Park.* 273. Something more must be protected than the revenue; the general provision of the act of 1713, (1 *vol. State Laws*, 102. *Gall. edit.*) gives a ground of exposition from all official bonds; and when revenue only is meant to be protected; or the penalty is to operate as a punishment to the delinquent, not as a relief to the injured; in the *English* statutes, as well as in the *Pennsylvania* code, the language of the legislature is appropriate and unequivocal. 19 *Geo.* 3. *c.* 56. *s.* 7. 1 *Anstr.* 586. 4th. If arguments *ab inconvenienti* may avail, what can be more forcible, than the inconvenience which proceeds from the opposite construction, when the auctioneer is regarded as a public agent, invested with the exclusive right to collect the monies on sales at auction? The rule is different as to a common law agency; where there are three voluntary parties, the owner, the agent, and the buyer; 2 *Vez.* 221. and the difference is not destroyed, though modified, in the case of an agent *del credere*. *Bull. N. P.* 130. 7 *T. Rep.* 359. Here, however, the licensed auctioneer is not only a legislative agent, *del credere*, to the buyer, but the state constitutes a fourth party, giving the law to every part of the transaction, to every degree of the responsibility. The auctioneer is, thus, a trustee for the

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1804. state. He, not the owner of the goods, nor the buyer, must pay the duties to the state; and he gives the security, not the owner. It naturally follows (and so is the practice) that immediately upon a sale, the auctioneer becomes the debtor to the owner of the goods, as well as to the state. The owner does not know the purchaser, and seldom inquires for him. The knowledge, or the inquiry, would be superfluous, as the auctioneer alone possesses the power to collect, as well as to sell: it is a vested right, by operation of law, and not, in its nature, assignable. 2 *Dall.* 174. 1 *H. Black.* 81. *Willing* v. *Roland.* (1) But, it is an universal principle, that where a power is given, a duty arises. The sheriff has a power to execute a *capias*; and, therefore, it is a duty to do it. The coroner has a power to hold inquests; and, therefore, it is a duty to hold them.

After deliberation, the COURT were, unanimously, of opinion, that the auctioneer's bond was intended, by law, for the benefit of his private customers, as well as for securing the duties payable to the government:

And, therefore, the judgments of the Supreme Court were affirmed; and the records remitted for further proceedings. (2)

(1) *Willing et al.* v. *Rowland et al. in the Supreme Court,* 1791, before M'KEAN, *Chief Justice,* and RUSH and BRYAN, *Justices.* This was an action of *assumpsit,* for goods sold and delivered. The goods were sent by the plaintiffs to the store of *John Meaze,* a licensed auctioneer, and were sold, at public vendue, to the defendants. *Meaze* became, soon afterwards, a bankrupt; and the defendants refused to pay the purchase money to the plaintiffs, insisting upon a right to set-off a debt due to them, from the bankrupt. The COURT were decidedly of opinion, that the plaintiffs could not maintain the present suit; that, by law, the right of action is vested in the auctioneer; and that the common-law rule in the case of factor and principal, did not apply to the case of a public auctioneer.

A verdict was, thereupon, given in favour of the defendant.

Bowie and *Hallowell* (by the latter of whom this note is obligingly furnished) for the plaintiffs, cited *Com. Dig. title "Merchant." B.* 81. 13 *Vin. Abr.* 9. *Roll. Rep.* 337. 2 *Vern.* 638. 3 *Bac.* 519. 2 *Stra.* 1182. *Co. B. p.* 236, 7. *Bradford* and *M'Kean,* for the defendants, who cited *Bull. N. P.* 130. 280. 12 *Mod.* 514. 5. *Molloy,* 466.

(2) In the case of *Dallas* v. *Hazlehurst et al* the defendants paid the amount of the penalty of the bond into the Supreme Court, to be disposed of, as the Court should direct. *Todd,* for several creditors who had not brought suits, or whose suits were subsequent in date, to Mrs. *Gapper's* suit, asked the opinion of the Court, whether the creditors of *Footman* were not entitled to share in the fund, *pro rata? Dallas* and *S. Levy* urged, that upon principle and authority, the creditor-first suing, was entitled to be first, and completely paid, before other creditors were admitted. The COURT were clearly of that opinion; and Mrs. *Gapper's* debt with interest was, accordingly, satisfied; leaving only the surplus of the fund for other creditors.

SUPREME COURT

OF

PENNSYLVANIA.

April Term 1790.

Geyer's Lessee *versus* Irwin.

THIS ejectment, depending in *Alleghany* county, was marked for trial, on the list of causes at *Nisi Prius*. The defendant's attorney, after looking at the papers of the opposite party, confessed judgment.

But now *Lewis*, producing an affidavit of a just and legal defence, moved to set aside the judgment, on the ground, principally, that the defendant was a member of the general assembly, attending his public duty at *Philadelphia*, at the time of marking the cause for trial, and confessing the judgment. He said, that the attorney had been compelled, either to go to trial, or to confess judgment; and that not being possessed of his client's proofs, he had preferred the latter course: but, he insisted, that, during the session of the legislature, every member was privileged against the necessity of attending to his private suits; and that, therefore, the cause had been irregularly placed upon the trial list.

Ingersoll, for the plaintiff, denied, that the legislative privilege extended to the present case; and urged, that even if it was a case of privilege, the attorney had waived it, by omitting to object at the proper time.

By the COURT: A member of the general assembly is, undoubtedly, privileged from arrest, summons, citation, or other civil process, during his attendance on the public business confided to him. And, we think, that upon principle, his suits cannot be forced to a trial and decision, while the session of the legislature continues.

But every privileged person must, at a proper time, and in a proper manner, claim the benefit of his privilege. The judges

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1790. are not bound, judicially, to notice a right of privilege, nor to grant it without a claim. In the present instance, neither the defendant, nor his attorney, suggested the privilege, as an objection to the trial of the cause: and this amounts to a waiver, by which the party is forever concluded.

We are, therefore, unanimously of opinion, that the judgment cannot now be set aside, or opened.

Carson *versus* Hood's Executors.

DEBT. Plea, *nil debet*. The principal point in this case was, whether debt would lie against executors, on a simple contract of the testator?

Bradford, for the plaintiff, stated the rule to be, that if the executors demur to the action, they are entitled to judgment; but, if they plead to issue, they cannot, afterwards, make the objection: and the following authorities were cited to maintain the distinction. *Cro. E.* 600. 557. *Cro. C.* 187. *Cro. E.* 121. 1 *And.* 182. *Golds.* 106. *Leon.* 165. *Vaugh.* 99. 1 *Sid.* 333. *Plowd. Rep.* 182. *Palm.* 32. *Cro. E.* 435. 459. *Yelv.* 56. 1 *Lev.* 200. 1 *Vent.* 139. *Vaugh.* 97.

THE COURT, being unanimously of this opinion, gave judgment for the plaintiff: having, on a preliminary point, decided, that after a verdict, they will presume, every thing was done, at the trial, which was necessary to support the action, unless the contrary appeared upon the record. 3 *Burr.* 1725. 1729. 1 *Wils.* 225. 2 *Stra.* 1180.

SUPREME COURT

OF

PENNSYLVANIA.

September Term 1791.

Donaldson *versus* Means.

THIS was an action brought by the indorsee of three bills of exchange, against the indorsor. On the trial, it appeared, that the bills were drawn in *April* 1776, at thirty days sight, by *Nathaniel Newton*, on *Wilt* and *Hobson* of *London*, in favor of *T. Armstrong*, and indorsed successively by *Armstrong*, and by *Means*, the defendant; that the bills were presented, and noted for non-acceptance, on the 24th of *March* 1777; and that they were presented, and protested for non-payment, on the 26th of *April* 1777.

The question to be decided, was, whether due notice had been given to the defendant of the protest of the bills; or he had done any act, which amounted to a waiver of notice?

On this point, a letter was produced from the plaintiff to his father, dated the 10th of *May* 1778, advising of the protest, and inquiring where *Means* resided. It was proved, that the father showed this letter to *Means*, as soon as possible after it was received, and *Means* repeatedly promised to remit the amount of the bills; but the protest was not exhibited to him, and never asked for; nor was any application made to the drawer, or to the first indorsor, for payment. Another letter was produced, dated the 12th of *August* 1779, written by the defendant at *Philadelphia*, to the plaintiff at *St. Eustatia*, in which he mentioned, that he had received a letter *of the year* 1776, referring to the protested bills; expressed a hope, that they would soon be paid; observed, that for want of a protest he had not been able to get payment from the drawer; but promising, nevertheless, to pay the amount to the plaintiff, whenever it was in his power to make a remittance.

For the plaintiff, it was contended, 1st. That during the war, when continental money was a tender, the holder of a bill of exchange

1791. change should not be required to pursue that strict punctuality, which might properly be exacted from him in a time of peace, and when his debt was not liable to be discharged in a depreciated paper currency. 1 *Dall.* 271. That notice being in fact received of the dishonoured state of the bills, it was not necessary in law to produce the bills and the protests; and that since the letter of *August* 1779, the plaintiff relied upon the defendant's new promises of payment. 2d. That even if a protest ought to have been transmitted, yet, as the defendant, with a full knowledge of all the circumstances, has made a new assumption, it is too late for him to take advantage of the omission in that respect. For, although want of notice may be considered, originally, as tantamount to payment; there are many cases in which the rule does not apply, or is dispensed with. As, where the drawer of a bill has no assets in the hands of the drawee; or where the drawer himself waives the right and benefit of notice. 1 *T. Rep.* 408, 9. *Bull. N. P.* 272. 276. 2 *T. Rep.* 713. And in the latter case, if he knows *the fact*, though he is ignorant of *the law*, he shall be bound by his waiver. *Doct.* and *Stud.* 303.

For the defendant. Independent of the special promise alleged by the plaintiff, the defendant cannot be charged on the bills of exchange; for, a protest is essential to enable any of the parties to recover against the others; and it must be exhibited. The law, in this respect, is founded on good sense. By exhibiting the protest, the holder of the bill shows, that he looks to the person, whom he addresses, for payment; and by delivering the protest, upon receiving satisfaction himself, he enables that person to pursue his remedy against those who are ultimately responsible. But 1st. There is nothing in the letter of *August* 1779, which can be regarded as an express, unqualified, promise. The whole letter must be taken together. It complains of a want of the protest; and its general spirit is no more, than a declaration, that "although the protest ought to have been sent, as it is presumed "to have been received, yet the holder shall not be permitted to "suffer." 2d. Even regarding it, however, as a promise, it is not legally binding, if it was made under a mistake. 5 *Burr.* 2670. 2 *T. Rep.* 648. *Cowp.* 287. 1 *P. Wms.* 357. 2 *Chan. Cas.* 154.

By the COURT: The law upon the subject is so clear, that the whole case resolves itself into the question of fact, on which the law is to arise. If the proof is satisfactory, that the defendant, under a knowledge of all the circumstances, absolutely promised to pay, he is, incontestably, bound by his promise. But, if his engagement was of a conditional nature, that he would pay, when the protest was transmitted; or if any material fact was unknown to him at the time of making the promise, the verdict should certainly be in his favour.

Verdict for the plaintiff.

Coxe, for the plaintiff.
E. Tilghman, for the defendant.

1791.

Little *versus* Dawson *et al.* Executors of Jones.

CASE for services rendered by *Jane Little*, the plaintiff, to *Aquila Jones*, the testator.

The COURT, in the charge to the jury, stated, that it was in full proof, that the plaintiff had served the testator, with great diligence, for a period exceeding eleven years, on which two questions arose: 1st. Was she entitled to any compensation? 2d. Had she received a compensation? As to the *first*, it was RULED, that if the services were rendered merely in *expectation* of a legacy, without any contract, express or implied, but relying, implicitly, on the testator's generosity, the action could not be maintained. The weight of the evidence, however, is that he promised to take care of her, though he did not say how; that at one time he offered to marry her; and, at another time, he said that he would provide for her as a child. As to the *second* question, it is merely a matter of fact, on which the jury must decide.

For the Plaintiff, *Rawle*.

For the Defendant, *Sergeant* and *Roberts*, who cited 1 *Vern.* 98. 2 *Atk.* 251. 409. 2 *Stra* 728. 1 *Dall.* 265. 1 *Bar.* 157. *Pract. Reg.* 357. 3 *Rep. Chan.* 64. 2 *Stra.* 910.

SUPREME COURT

OF

PENNSYLVANIA.

January Term 1792.

Bradley's Lessee *versus* Agnes Bradley.

EJECTMENT tried in *Dauphin* county. The lands in question were once, incontestably, the lands of the defendant; for, the plaintiff claimed under her. The plaintiff set up an immediate title by the will of *Samuel Bradley*, deceased (the husband of the defendant) who devised the premises to him, the contents of the will being proved by the person who drew it; but in order to prove a title in the devisor, parol evidence was, also, given, that the defendant had previously conveyed to him *in fee*. To rebut this evidence, proof was produced, that the conveyance in fee was executed, merely for the purpose of making the devisor a plaintiff in partition; and that, immediately afterwards, that conveyance was destroyed; and a deed (which was exhibited) made to him *for life*. The principal question agitated in Court was, whether the deed for life, was genuine, or forged? But when the jury withdrew, two of them testified to their brethren, that, although the defendant had bought the land; yet, the bonds, which she gave for the purchase money, were unpaid, when she intermarried with the testator, and that the testator had been obliged to discharge them. On this representation, several of the jury, who were before in favour of the defendant's title, concurred in finding a verdict for the the plaintiff: and a motion was made for a new trial, on the following grounds.

1st. That the verdict was against evidence, and the opinion of the Court.

2d. That the jury had misbehaved, by hearing testimony, which was not delivered in open Court.

3d. That evidence was allowed to be given of the contents of a deed, and of a will, without previous notice to the defendant to produce it.

On

On arguing the motion for a new trial, *Ingersoll*, for the defendant, produced the depositions of two of the jurors, setting forth, that, after the jury had withdrawn, two other jurors had affirmed certain matters of fact, which (though the facts were denied at the time) had induced the deponents to find a verdict for the plaintiff: and, also, the depositions of two witnesses, contradicting the facts, that had been so affirmed. *Lewis*, for the plaintiff, produced the depositions of six of the jurors, explaining their conduct, and averring, that the whole twelve were of opinion, that another deed, conveying the premises in fee, had been executed. 1792.

After commenting on the evidence, upon the first and second grounds of exception to the verdict, *Ingersoll* cited the following authorities upon the *second* ground to show, that the evidence of the misconduct of the jurors was admissible: *Cro. E.* 189. *Moore*, 599. 2 *Morg. Ess.* 25. 1 *Stra.* 644. *Salk.* 647. and the following authorities upon the *third* ground to show, that parol evidence of the contents of a deed can only be admitted, after notice to produce the deed itself. 2 *T. Rep.* 43. 201. 4 *Burr.* 2489. He, also, urged that it was a cause of value; and, in every aspect, merited reconsideration. 1 *Dall.* 234. 12 *Vin. Abr.* 336. 47. 12 *Mod.* 347, 8. *Doug.* 118. 123.

For the plaintiff, *Lewis* observed, that the verdict was given on a question of fact, after a full hearing, in a case, in which a recovery is not conclusive; and that the principle which influenced Courts to interfere with the province of juries, by setting aside a verdict, did not apply to such a case. He investigated the evidence on the trial; and insisted, that it was not necessary for the plaintiff to produce the deed in fee, but only to establish that it once existed, for, no subsequent destruction of it, could revest the estate in the grantor; that whatever difference of opinion might exist, on other points, the jury were unanimously of opinion, that such a deed was executed; and it was immaterial to the issue, on the question of title, whether the defendant had paid the purchase money, or not. As to the parol evidence of the will, the copy of one will was produced, and the scrivener, who drew the other, besides testifying what passed on the occasion, when the defendant was present, exhibited the original rough notes of the draft. If this evidence was admissible, it was conclusive; for, she knew of the devise to the plaintiff in fee, and she acquiesced in it. It was admissible, without notice to produce the will; because, it was not offered to establish a title under the will, but to prove co-temporaneous conversations and actions of the parties, from which the fact of an existing conveyance, in fee, to the testator, might be inferred. The general rule, however, is conceded, that in order to introduce parol evidence of the contents of a deed, its existence and loss must be proved; or proof must be given that it was in the possession of the opposite party, who refused

1792. after reasonable notice, to produce it. But the evidence, in the present case, was not offered to prove the contents of a deed in the defendant's *possession;* but the contents of a deed, which she had actually *destroyed.* The reason of the rule ceasing, the rule itself must cease. The only remaining topic for remark, respects the misconduct of the jurors; upon which there is an essential variance in the evidence. But, it is enough to say, that if the jury did misbehave, the proof of the fact, in order to affect themselves, or their verdict, must proceed from another quarter: it cannot be received on their own depositions. 1 *T. Rep.* 11.

Ingersoll, in reply. The motion for a new trial is as proper, and as much countenanced, in ejectments, as in any other suits. 4 *Burr.* 2221. If a deed, given for a special purpose, is afterwards cancelled, and a subsequent deed is accepted by the grantee for a less estate, the destruction of the first deed will operate as a revestment. Whether the deed in fee was given for a special purpose, constitutes the great inquiry in the present cause; and the establishment of the fact will be decisive one way, or the other. Nothing can fairly be inferred, from the supposed acquiescence of the defendant in the devise; for, the devise does not specify the land in question; but includes it, if it is included, in a general sweeping clause, disposing of all his real and personal estate. The rule, as to giving the contents of deeds in evidence, is not susceptible of the qualifications suggested for the plaintiff; nor was there any idea at the trial, that the deed was destroyed, though it was said to be secreted. As to the mode of proving the misconduct of a jury, it must be conceded, that the Courts have varied in their opinions and practice. How far jurors should be permitted to accuse themselves of a high misdemeanor, is a doubt. Yet, in 3 *T. Rep.* a witness, who had received a bribe, was permitted to prove the act of corrupting him against the defendant; because, the necessity of the case required it. A similar necessity seems to furnish the same law, in cases like the present. In *Cowperthwaite* v. *Jones*, the jury settled the damages by a mesne form, taken from a calculation of the several sums, which the jurors, individually, set down; and, on a motion for a new trial, the affidavits of the jurors, proving the fact, were read, and considered by the Court. That the matters stated, were immaterial to the issue, cannot surely avail the plaintiff; when it is recollected, that they had a decisive effect against the defendant; and that they were false.

After advisement, the COURT were clearly of opinion, that a new trial ought to be granted.

Rule for a new trial absolute.

1792.

Smith *versus* Brodhead's Executors.

THIS cause was tried at *Berks*, *Nisi Prius*, in *October* 1791, when the jury found the following special verdict:

"The jury find, that in the year 1785, the plaintiff sold a tract of "land to *Daniel Brodhead*, Esq. (the husband of *Rebecca Brod-* "*head*, the defendant's testatrix) for the sum of 500*l.*; that the "land has since been sold, by execution, after the death of *Re-* "*becca Brodhead*, the testatrix, for the proper debt of the said "*Daniel*; that 150*l.* of the purchase money was paid in hand, "and the said *Rebecca* gave six bonds for the payment of the "residue, in annual instalments; that the said *Rebecca*, at the "time of executing the bonds, was a *feme covert*, living with "her husband, and continued so to do, until her death; that she "was seised of a separate estate, under a deed of settlement, "with power, *inter alia*, to make a will; that by her last will, "duly proved, she appointed the defendant her executor, and, "*inter alia*, directed the payment of her debts; that two of the "bonds were duly paid in the lifetime of the said *Rebecca*; and "the present action is brought upon another of the bonds.

"If upon the above case, the Court should be of opinion, that "the plaintiff is entitled to recover, the jury find for the plaintiff in "this cause 60*l.* debt, 12*l.* 12*s.* damages, and six pence costs: "otherwise, they find for the defendant."

The general question was, whether the bond of a *feme covert*, bound her estate, in the hands of her executors, under the circumstances stated, in the special verdict?

For the plaintiff, the case was discussed on several grounds: 1st. That a Court of Chancery would give relief upon the bond. 2d. That to prevent a failure of justice, the Courts of *Pennsylvania* will amplify their jurisdiction, upon principles of equity. 3d. That the will of the testatrix, directing the payment of debts, would make the bond a charge on the executors, as a debt in equity. And the following authorities were cited to show the principle, on which a Court of equity would interpose; and the extent to which the Courts of *Pennsylvania* had exercised an equitable jurisdiction. 1 *Vez.* 517. 163. *Prec. Ch.* 328. *Gilb. Eq.* 83. 2 *Vez.* 193. *Brown. Chan.* 20. 2 *Atk.* 68. 1 *T. Rep.* 5. *Pow. on Cont.* 89. 1 *Dall.* 213, 4. 339, 340. *Eq. Rep. Gilb.* 84. 1 *Dall.* 17. 72. 428. 2 *Vern.* 225. *Doug.* 53. *Cowp.* 201. 4. The executors being bound to pursue the directions of the will, the devisee ought not to be permitted to resist it.

For the defendant. A Court of Chancery would not do that for the plaintiff, which would be the consequence of a general judgment in his favour. The wife's engagements have never been

1792. been satisfied in equity, beyond her personal estate, and the rents and issues of her real estate; but a general judgment in *Pennsylvania*, would bind the real estate absolutely; so that it might be taken in execution and sold. If, indeed, this were a Court of equity, the defendant might make many matters appear to rebut the plaintiff's equity, which it is too late to urge on a special verdict. And this Court, as a Court of common law, will never consider bonds as appointments, when the party could not legally enter into a bond. 2 *P. Wms. Norton* v. *Turril.* 1 *Br. Ch.* 16.

Cur. adv. vult. (1).

The Commonwealth *versus* Dillon. (2)

THE prisoner (a boy about 12 years old) was indicted for arson, in burning several stables, containing hay, &c. He was examined before the mayor of the city of *Philadelphia*, on the 20th of *December* 1791, and then confessed the commission of the offences, with which he was charged. But, as his own confession was the principal evidence (indeed there was no other positive evidence) against him, his counsel insisted, that it was obtained under such duress, accompanied with threats and promises, as destroyed its legal credit and validity. The evidence on that point was, substantially, as follows:

On the 18th of *December*, the prisoner was committed to the jail of *Philadelphia*, and the next day was taken before the mayor; but, at that time, he made no confession. On the 18th and 19th of *December* he was visited and interrogated, by several respectable citizens, who represented to him the enormity of the crime; urged a free, open, and candid, confession, which would so excite public compassion as, probably, to be the means of obtaining a pardon; while a contrary course of conduct would leave him, in case of a conviction, without hope: and they added, that they would themselves stand his friends, if he would confess. The inspectors of the prison endeavoured, likewise, to obtain from him a discovery of his offences, and of his accomplices. They carried him into the dungeon; they displayed it in all its gloom and horror; they said that he would be confined in it, dark, cold, and hungry, unless he made a full disclosure; but if he did make a disclosure, he should be well accommodated with room, fire, and victuals, and might expect pity and favour. The prisoner continued to deny his guilt for sometime; and when his master visited him, he complained of the want of clothes, fire, and nour-

(1) The Reporter has not been able to trace the decision of this cause.

(2) The trial was held at a Court of *Oyer* and *Terminer*, in *Philadelphia*, on the 31st of *January* 1792, before M'KEAN, *Chief Justice*, and SHIPPEN and BRADFORD, *Justices*.

ishment.

ishment. At length, however, on the 19th of *December*, he made successive acknowledgments of the facts contained in his confession, which was formally, and to all appearance, voluntarily, made before the mayor, on the succeeding morning; and which was repeated, with additional circumstances, at subsequent periods. 1792.

In the prisoner's defence, the following authorities were cited, principally to guard the jury against the danger of mere presumptive evidence, and an extorted confession of guilt, through force, hope, or fear, particularly in the case of an infant. 4 *Bl. Com.* 357. *Fost.* 243. 2 *Tri. per Pais.* 603. 2 *H. H. P. C.* 225. 4 *Bl. Com.* 326. *Leach C. L.* 248. 319. 3 *Com. Dig.* 511. *Staundf.* 142. 2 *H. H. P. C.* 284, 5. 3 *Bac. Abr.* 131. 3 *Inst.* 232. 2 *Hawk.* 604. 8 *Mod. Fost.* 11. 244.

For the commonwealth. The confession was delivered before the mayor, and afterwards repeated and enlarged, without the least appearance of constraint, or terror. No public officer has improperly attempted to excite fear, or hope, as the medium of extorting a discovery; and all that was said, or done, in that respect, proceeded from the avowed friends of the prisoner, and the known promoters of humanity. Besides the confession itself bears intrinsic marks of its sincerity and truth; and neither the wildness of the boy's motive, for committing the crimes, nor his youth, can afford a satisfactory answer to the charge. *Fost.* 70. And, after all, to destroy the legal effect of the confession, as evidence, it must be proved, 1st, that previous improper means were employed; and 2d, that the confession was the immediate consequence of those improper means.

By the COURT: The fact of the arson is established; and it only remains to decide, whether it was committed by the prisoner? The proof against him, depends upon his own confession, slightly corroborated by the testimony of two witnesses. The confession was freely and voluntarily made, was fairly and openly received, before the mayor; and, therefore, it was regularly read in evidence. But still, it has been urged, that it was thus apparently well made before the mayor, in consequence of improper measures previously pursued with the boy. The interference of the inspectors of the prison was certainly irregular; though the public anxiety, in which they participated, upon this extraordinary occasion, may be admitted as an excuse. The manner in which he was urged, though not threatened, by the citizens who visited him, may, likewise, be objectionable. But is it reasonable to infer, that all the prisoner's confessions were falsely made under the influence of those occurrences? Consider the nature of the offence. It cannot be openly perpetrated; for, it would be instantly prevented; and if it is secretly perpetrated, how, generally speaking, can the offender be detected,

1792. ed, but by his own declarations? If such declarations are *voluntarily* made, all the world will agree, that they furnish the strongest evidence, of imputed guilt. The hope of mercy actuates almost every criminal, who confesses his crime; and merely that he cherishes the hope, is no reason, in morality, nor in law, to disbelieve him. The true point for consideration, therefore, is, whether the prisoner has falsely declared himself guilty of a capital offence? If there is ground even to suspect, that he has done so, God forbid, that his life should be the sacrifice! While, therefore, on the one hand, it is remarked, that all the stables set on fire, were in the neighbourhood of his master's house; that he has, in part, communicated the facts to another boy; that his conduct had excited the attention and suspicion of a girl, who knew him; and that he expressed no wish to retract the statement, which he has given: the jury will, on the other hand, remember, that if they entertain a doubt upon the subject, it is their duty to pronounce an acquittal. Though it is their province to administer justice, and not to bestow mercy; and though it is better not to err at all; yet, in a doubtful case, an error on the side of mercy is safer, is more venial, than error on the side of rigid justice.

Verdict, Not Guilty.(1)

For the Commonwealth, *Ingersoll*, attorney-general.
For the Prisoner, *Sergeant* and *Todd*.

(1) The humanity of the jury being gratified by an acquital of the prisoner, from the capital charge, he was indicted and convicted, on the same facts, for a misdemeanor. By the reform of our penal code, Arson is no longer a capital crime.

SUPREME COURT

OF

PENNSYLVANIA.

April Term 1792.

Morris's Lessee *versus* Smith.

EJECTMENT for 23 acres in *Philadelphia* county. It was agreed, that *John Hunt*, (under whom both parties claimed) did seised of the premises; and the lessor of the plaintiff's immediate title was derived under a judgment obtained against *Hunt's* executors, in *June* term 1786, at the suit of *Thomas Corbin* for 105*l.* 10*s.*; upon which there was an execution, a sheriff's sale, and a sheriff's deed to the plaintiff, dated the 5th of *June* 1787.

The defendant relied upon this statement: *Hunt* died the 31st of *March* 1778, having made his will, and leaving an only son, who sold and conveyed the premises to *William M'Cullough*, on the 26th of *December* 1778, for a full and valuable consideration. But it was decided in the year 1786, (1) that such a conveyance by the heir at law, or devisee, was not sufficient to protect the real estate from creditors; and, then, the widow and executrix of *Hunt*, confessed a judgment to *Corbin*, upon which the premises were taken in execution, and sold to the lessor of the plaintiff, but, in truth, for the widow's use. *John Hunt*, the father, had, also, left a considerable real property in *New-Jersey*; yet, to defeat *M'Cullough's* purchase, and to get clear of the law of *Pennsylvania*, that property was left unsold, and unappropriated; and the premises pursued to satisfy this voluntary judgment.

But the plaintiff, to rebut the insinuation of collusion and fraud, proved satisfactorily, that *Hunt* had purchased the lands in *Pennsylvania*, as well as in *New-Jersey*, with money borrowed from *Corbin*; for the amount of which he had given his bond, dated the 1st of *January* 1762; that several partial payments were in-

(1) See 1 *Dall. Rep.* 170.

dorsed

1792. dorsed on the bond; that, on the 26th of *October* 1768, the balance being then considerable, *Hunt* conveyed to *Corbin* a tract of land in *New-York*, and several tracts of land in *New-Jersey*, including the greater part of the property mentioned by the defendant; that on the 6th of *September* 1787, the plaintiff conveyed the premises to *James Pemberton*, for the nominal consideration of five shillings; and that *Pemberton* executed a declaration of trust, to the use of *Corbin*.

Upon this developement of the case, however, two points were made, and, at the request of the counsel, reserved for future argument:

1st. Whether the land could be sold by virtue of the judgment, without a *scire facias* against the *terre-tenant*?

2d. Whether the land was liable for the testator's debts, after being aliened by the heir at law, *bonâ fide*, and for a valuable consideration?

Verdict for the plaintiff. (1)

Calhoun's Lessee *versus* Dunning. (2)

EJECTMENT. The inception of the plaintiff's title depended upon an extract from the record of licences, or grants, by *Blunston*, dated *March* 1734-5, which was merely a minute in these words: "*John Calhoun* 200 acres on *Dunning's* run, called "the *Dry Spring*, between *Jacob Dunning* and *Ezekiel Dun-* "*ning*." By the field notes of *Cookson*, a surveyor, it appeared that there was a survey of the land on the 22d of *March* 1743-4, for *Robert Dunning*; but a memorandum was afterwards made by one *Morse*, a clerk to the surveyor, "that the land was claimed "by the heirs of *John Calhoun*." *John Calhoun* having entered a caveat, the decision of the board of property was pronounced, on the 24th of *November* 1766, setting forth, "that under *Blun-* "*ston's* licence, *J. Calhoun* took possession and cleared three "acres, built a cabin, and returned to *Chester* county, where he "dwelt: that in 1743 one *Armstrong* got a warrant, but was told "by *Dunning* that the land belonged to *Calhoun*, of whom he "had purchased it: that afterwards *Dunning* took out a war- "rant in his own name, and got a survey made, on which a ca- "veat was entered against him: that an ejectment was brought, "in which *Dunning* lost the possession; that *Dunning* then pur- "chased *Armstrong's* warrant, got a survey upon it, and now

(1) It does not appear that these questions were ever argued in the present suit. But see 1 *Dall. Rep.* 481.

(2) Decided at *Carlisle*, in *Cumberland* county, *Nisi Prius*, 11th *May* 1792, before SHIPPEN and BRADFORD, *Justices*.

"claimed

"claimed a patent: but the board of property ordered the patent "to issue to *Calhoun*." By will, dated the 19th of *September* 1752, *John Calhoun* devised the premises to *Rebecca Calhoun*, who conveyed the same to *James Calhoun*, the lessor of the plaintiff, by deed the 20th *July* 1763; and he, having made a re-survey, on the 5th of *September* 1788, obtained a patent on the 3d of *April* 1789. 1792.

The defendant's claim depended on the following facts: In 1753 *Dunning* lived on the premises and reaped corn on it so late as 1778. In 1779, one *Caruthers* was making a fence on part of the land; he continued to live there at the time of the re-survey in 1788; and he was considered as the owner by purchase from *Calhoun*. But in 1764, a survey was made for *Dunning*, under *Armstrong's* warrant, which, as the surveyor affirmed, left the disputed land entirely out of the lines. In an action of trespass, between *Dunning* and *Caruthers*, (plea, *liberum tenementum*) there was a reference, in the year 1783, on which it was awarded, and the award affirmed by the Court, that the line should be run between the parties, so as to leave the disputed land, in the possession of the plaintiff, *Dunning*.

1st. It was objected, that the record of the action of trespass, could not be read on the trial of the present ejectment, as it was not between the same parties. But, it was answered, that *Caruthers*, the defendant then, was now the person really interested, as owner of the land; that *Calhoun* was merely a trustee; and that, as an action might be brought in the name of the *cestui que trust*, 1 *Dall. Rep.* 72. the judgment ought to be admitted.

And, by the COURT: We can never acquiesce, in an attempt, so manifestly calculated to evade the truth and justice of the case. Shall it be in the power of a party, by suppressing a deed; or by employing the name of a trustee; to avoid the legal effect of a judgment rendered against him? In the action of trespass, *Caruthers* pleaded *liberum tenementum*, as to the very lands now claimed by *Calhoun*; and *Calhoun* has never controverted his right. It is plain, therefore, that *Calhoun's* name is now employed, for the use of *Caruthers*; and that the parties are really, though not nominally, the same, in both suits.

Objection over-ruled.

2d. In the charge to the jury, it was stated,

By the COURT; *Blunston's* licences have always been deemed valid; and many titles in *Pennsylvania* depend upon them. The equitable right acquired by the lessor of plaintiff under a licence, has been perfected, by a survey, and patent; so that he clearly possesses a legal title to the land in dispute.

On the other hand, the defendant has no office right, but rests his pretensions, on an early possession, the exclusion of the dis-

1792. puted land in the re-survey of 1764, and the award and judgment, in the action of trespass. Of the equitable circumstances, the jury will judge, with this remark from the Court; that a mere improvement right, ought never to be rendered effectual in favour of a settler, when it commences subsequent to the existence of the legal right, regularly vested in another.

The great objection, however, to the plaintiff's recovery, arises from the award and judgment. To be sure, an award cannot give a right to land; but a report of referees will settle a dispute about land, either in an ejectment, or in an action of trespass. In the case of *Fox's Lessee* v. *Franklin*, a similar report has been made, and affirmed. Indeed, such a report is more operative than a verdict: for, a verdict in ejectment is not conclusive; but when parties chuse to adjust their disputes amicably, they generally agree, that the award shall be final; and, under such an agreement, neither of them can hope again successfully to agitate the same points.

Under this charge, the plaintiff suffered a nonsuit. (1)

Gander's Lessee *versus* Burns *et al.*

EJECTMENT for lands in *Mifflin* county. On the trial of the cause, the following general principles were stated in the charge to the jury.

By the COURT: The first inquiry is, whether the location and warrant call for the same place. If they do, then as there is ground enough to satisfy both, one shall not run away with all, but shall be confined to what he *purchased*.

This is the rule in the board of property, and if *Snedon's* rights have not been abandoned nor transferred to *Dearmond*, it is the rule that ought to be applied here.

Those rights do not seem to have been abandoned: for in 1761, the children were infants, and were hardly of age, when this action was brought. *Laches* cannot, therefore, be imputed.

Whether *Dearmond* purchased must be left to the jury: he had the receipt, and that is some ground for presumption added to his own declarations, which, as they come on the part of the plaintiff, are evidence.

But if the rights remain, then the next question is, how shall the location and warrant be laid? This must be determined either by the (1) description; or (2) by the prior improvement; or (3) by the priority of date.

As to the description, *Snyder* calls for *Everhart* as his boundary, and *Foster* for *Buchanan*, at opposite ends of the whole

(1) Decided at Nisi Prius, *Carlisle, Cumberland* county, in *May* 1792.

tract;

tract: so that, it would seem, one might begin on one quarter, and another on the other quarter, till they meet. 1792.

But if the priority of improvement is clear, that being the spot *designed by* the improver, ought, perhaps, to be assigned to him.

If no other rule can be taken, the priority of date, ought to give the preference to the party whose warrant is oldest, to lord it as he chuses.

Verdict for the plaintiff, &c.

Massey *et al.* Executors of Massey *versus* Leaming. (1)

DEBT. Plea, payment, with leave to give the will of testatrix in evidence.

The case was, simply, this: Mrs. *Massey*, the testatrix, was in a low state of health for some time before her death; the defendant took the charge of her affairs, and had some accounts against her; but he borrowed 150*l.* from her, for which he gave a bond payable in one year, with interest. On the 5th of *June* 1784, she made her will, which was proved on the 21st of *June*, containing, among other things this bequest: "I give to *T. Leaming*, in consideration of his many services to me, 200*l.* in real specie; provided he brings no account against me and my estate; and if he happen to bring any account against me, or my estate, then this bequest to be void;" with a devise over of the testatrix's estate. The legacy was paid to *T. Leaming*; the present action was brought upon his bond; and the question of law arose, whether the bequest operated as a release?

The plaintiff's counsel suggested, that they were ready to prove, that there was a deficiency of assets to pay debts.

Upon this suggestion, it was agreed, that a verdict be given for the plaintiff, subject to the opinion of the Court, whether the bequest was an extinguishment of the debt? If it was so considered, then the plaintiff shall be at liberty to prove a deficiency of assets, for the payment of debts.

After depending for a great period on the docket, the suit was, finally, marked "not to be brought forward."

Tilghman and *Levy*, for the plaintiff.
Sergeant, for the defendant.

(1) Tried at Nisi Prius, *Philadelphia* county, in *May* 1792.

SUPREME COURT

OF

PENNSYLVANIA.

September Term 1792.

Vaughan *et al.* Assignees of Nancarrow *versus* Blanchard *et al.*

DEBT, for rent. The facts were these: *Nancarrow* advertised to let the room and front cellar of a house, which he rented from *Pemberton*; and the defendants agreed to take them at 130*l. per annum*, commencing the 27th of *July* 1784, and continuing till the end of *Nancarrow's* term in the house. A lease in writing was drawn, but never executed, though the defendants entered into possession of the premises, made some repairs, and paid a part of the rent. Soon, however, after the defendants had taken possession of the room and cellar, it was again advertised to be let, with directions to apply to them for particulars; and, accordingly, they let the premises to one *Dixon*; *Dixon*, again let them to *Fox*, the agent of a merchant of the name of *Leuffer*; and *Leuffer* deposited a considerable quantity of merchandize in the cellar. *Nancarrow* now claimed a right to pass through the front cellar, into the back cellar; *Leuffer* objected to it; but, upon *Nancorrow's* persevering, he took another house, at the end of *Dixon's* time (6 or 9 months) to which he removed his goods. *Leuffer's* agent offered to pay his rent to *Nancarrow*, but *Nancarrow* refused to accept it, unless the receipt was taken, as from *Blanchard*. Under these circumstances, the present action was brought to recover a half year's rent, on a demise (as stated in the declaration) to hold from the 27th of *July* 1784, until the expiration of *Nancarrow's* term in the premises, with an averment that *Nancarrow* had a lease from *Pemberton*. *Blanchard*, then, instituted an action against *Fox*, to whom the premises were under-let for *Leuffer*; but declaring that he would only prosecute his claim, if he was compelled to pay the plaintiffs, in the present suit,

1st. *Sergeant*

1st. *Sergeant* and *Ingersoll*, for the defendants, moved to nonsuit the plaintiffs, because there was no proof of a lease from *Pemberton* to *Nancarrow*, as the declaration averred. The only ground of recovery in this action, is either, that the defendants actually occupied the premises; or that the plaintiffs, in pursuance of the bargain, had vested them with a right of occupancy. Now, the lease of the defendants was made dependent upon the lease of *Pemberton*; and *non constat* that such a lease existed, as it has not been produced, or any regular account given of it. *Doug.* 642, 3. 1792.

But, by the COURT: Whether it is necessary, or not, in this action, to prove the existence of a lease from *Pemberton*, there is no ground for a nonsuit. The plaintiffs have offered some evidence to show, that *Nancarrow* possessed a term in the house; and of the operation and effect of that evidence, however it applies to the issue, the jury must judge and decide.

2d. In the charge to the jury, it was stated by the COURT, that the cause depends upon a single fact, whether *Nancarrow* had a right of passage through the front, into the back, cellar? The affirmative, it was incumbent on the plaintiffs to prove; but they had not proved it, either by written, or parol, evidence. Then, the law declares, that such an interruption, in the enjoyment of the premises, demised, will suspend the rent.

Verdict for the defendants.

The Commonwealth *versus* Margaret Biron.

INDICTMENT for the murder of *Jane M'Glaughlin*. It appeared in evidence, on the trial, that *Hugh M'Glaughlin*, the husband of the deceased, rented from the prisoner, a part of the house, in which she lived; that on the 10th of *June* 1792, while it rained hard, a noise was heard at the house, and the deceased was attempting to get in; that she said, "You whore, let me come in;" and the prisoner said, "You whore, you sha'nt;" that the deceased appeared to be then in liquor, though by all accounts, she was a very quiet woman; that the prisoner opened the door, and she and the deceased began to struggle, when the former pushed the latter down the steps, and her head struck the wall; that the deceased seemed to be bent by her fall, and the prisoner came out of the house, saying, "Ah! "this is the way I am troubled with this kind of people! her "husband has just left her in this situation;" that the witness observed, "You pushed her down," to which she answered, "I did not;" but, after the deceased was carried into the house, she acknowledged that she had done it, and said she was in a great passion; and that the deceased and the prisoner used before

1792. fore to quarrel, but had not been seen to strike each other. On examining the deceased, Dr. *Hutchinson* said, that he found considerable injury done to the bone on one side of the head; but that the wound was not necessarily mortal; and he thought, from appearances, that the deceased must have been intoxicated, at the time of her fall.

By the COURT: The circumstances present to the consideration of the jury, a case of atrocious manslaughter; but, in our opinion, no more.

Verdict, guilty of manslaughter, but not guilty of murder. (1)

(1) The indictment was tried in a Court of Oyer and Terminer, in *Philadelphia* county, on the 19th of *November* 1792.

SUPREME COURT

OF

PENNSYLVANIA.

April Term 1793.

The Bank of North-America *versus* Pettit.

CASE against the payee and indorser of a promissory note, drawn by *George Henry*, for 1100 dollars, payable in 45 days, and dated the 26th of *March* 1785. The defence was, that due notice had not been given of the drawer's non-payment of the note; and the following evidence was produced *pro* and *con*.

For the plaintiff, the runner of the bank stated, that he believed he gave the drawer notice when the note became due, as it was his custom to do; that it was also his custom, at the expiration of the three days grace, to give the indorser notice; and, he conceived, he must have called on the defendant on the evening of the last day of grace; but, if not then, he was very clear he called the next day, or the second succeeding day at farthest; that he thinks he spoke to the defendant's son, and supposes he mentioned his business; that his reason for thinking he gave notice is, that he has a memorandum of *Henry's* notes lying over; and the president of the bank was very particular about them, and the indorsers; that when he called at the defendant's counting-house, he gave verbal notice, that the indorsement was unpaid, and the person he saw, told him that he would inform the defendant of it; that it was not then a practice to leave written notice; and, finally, that he was not doubtful, but very clear, that he gave the notice.

For the defendant, his clerk declared that it was usual to leave notice of the protest of notes in writing; and that he did not recollect that either written, or verbal, notice was given in the present case. The defendant's son declared that he had no recollection of receiving any notice; but, on the contrary, he remembered,

1793. bered, that, upon making an estimate of his father's indorsements at the bank, the cashier said they amounted to 2,300 dollars; and this being denied, *Henry's* note was produced; which was the first intimation that the son ever had of its existence, or of its being protested.

It was argued by *Tilghman* and *Lewis*, *for the plaintiff*, that although the cause turned upon a mere matter of fact; and that fact being established, the decision must be governed by the principles of the mercantile law, which, generally considered, are the same throughout the mercantile world; yet, that there are special usages, arising from local circumstances, or municipal policy, that must prevail, in modifying the operation of the general law of merchants. Thus, the general law of merchants declares, that the acceptor of a bill of exchange is bound by his acceptance; but how far he is bound, varies at different places. *Burrow* v. *Jemino*, 2 *Strange*, 733. So, notice of the protest of a bill of exchange must be given, upon the principles of the general law; but there is a different usage, in different places, as to the strictness of the time, within which the notice must be given. The statute of *Anne*, introduced the negotiable character of promissory notes, and the process of declaring upon them as instruments. The practice of giving notice, in the case of promissory notes, soon followed in *England*, though the statute speaks nothing of the time; but, at first, a great latitude was allowed; and it is only, step by step, that the present degree of strictness on the subject, has been there established. In *Pennsylvania*, however, promissory notes were scarcely to be regarded as a currency before the revolution; insomuch that it is difficult to trace a suit on the records of the Courts, by the indorsee against the indorser. The act of assembly of 1715, which gave the indorsee an action against the drawer, in his own name, made no positive provision on the subject of notice; and the *English* practice was not adopted under the act. Punctuality, indeed, in paying such engagements was rare, and, almost, impracticable, from the state of the country. The bank of *North-America* began the rule of punctuality; and originated the usage of notice; and upon that usage, a period of six, seven, or eight, days has been allowed for giving the notice. What, then, is the evidence of a demand of payment from the indorser, is a reasonable time, is the only question. The runner of the bank gave notice of the protest; and this, by the common understanding of our merchants, amounts to information, that the holder of the note looks to the indorser for satisfaction. The cases cited for the plaintiff were, 2 *Stra.* 1175. 1248. *Ld. Raym.* 744. 1 *Dall.* 252. *Robertson* v. *Vogle*. *Ibid.* *Bank* v. *M'Knight*.

It was argued by *Ingersoll* and *Sergeant*, for the defendant, that the holder of a dishonoured note, must conform to the law merchant,

merchant, which requires notice to be given to the indorser; as even the declaration shows, by the averment that notice was given: and, they contended, that the notice in this case (if given at all) not being given to the defendant on the very next day, after the expiration of the days of grace; and not being accompanied with an explicit demand for payment; was not a sufficient notice, according to the law of merchants; which being, in this respect, founded on general principles of reason and equity (to prevent the indorser from suffering by the indulgence, or negligence, of the holder) was as applicable in *Pennsylvania*, as in any other country. They cited 1 *Wils.* 47. 2 *Bl. Rep.* 747. *Doug.* 650. 2 *T. Rep.* 1 *Dall.* 252. *Bull. N. P.* 274. 6. 1 *Stra.* 508. 1793.

By the COURT: The defence is want of notice of the protest of the note in question, within a reasonable time. The law in *England* is very strict upon this subject. Before any statute existed there, to render promissory notes negotiable, such notes were often made; but they were only regarded as evidence of a debt, and could not, as instruments, be declared upon in an action at law, till the provision was made in the statutes of *W.* 3. and *Anne*. It is not material, however, to review the history of this paper medium either here, or in *England*; since it is clear, that in both countries, at this day, the law requires, that notice must be given by the holder, to the indorser of a promissory note, with a demand of payment, in *a reasonable time*, after the note is dishonoured by the drawer. What constitutes a reasonable time, was formerly considered, by the *English* Courts, in most cases, as a matter of fact, for the decision of a jury: and since it has been deemed by those Courts, a matter of law, they have held, that if the parties live in the same town, an allowance of even a single day to the holder is quite sufficient. But in *Pennsylvania* the question of reasonable notice still remains a fact for the jury to determine. Before the institution of the bank of *North America*, promissory notes were few; there was no time fixed for giving notice; and two, or three, months have often elapsed, before it was given. The bank had, however, a right to introduce new rules, for transacting business with their customers; and those rules being understood and enforced, formed a law of the contract, binding on both the parties. Indeed, the punctuality, and other beneficial consequences, flowing from those rules, seem to have given them a more general operation and force; so as to constitute a general usage, and not merely a usage of the bank. But notwithstanding the necessity of giving notice exists, on general principles, as well as upon the usage, its reasonablenes, we repeat, still depends here upon the verdict of the jury. As soon as we can, consistently with the state of the country, its roads, and its posts, it will be wise to adopt the *English* law upon the

1793. subject, for the sake of certainty and uniformity, in the administration of justice: and, perhaps, (such is the rapid progress of population and public improvement) the Court may, in future, incline to adopt it.

Stansbury *versus* Marks.

CASE. Plea, *Non Assumpsit*. The defendant offered to give *infancy* in evidence on this plea; to which the plaintiff objected. But

By the COURT: The evidence is clearly admissible. Under the general issue, however, the jury may decide, whether the evidence is sufficient to discharge him, or not. The position is generally true, that an infant can only bind himself for necessaries; yet, in the Court of Chancery, cases occur, in which a payment would be decreed, contrary to the strict rule of the common law. In this form of action, equity is the principal consideration; and, from necessity, the Courts of law, in *Pennsylvania*, adopt the principles of the *English* Courts of Chancery.

J. Conrad *versus* Conrad *et al.* Administrators of G. Conrad.

THIS was an action on the case, brought by *James Conrad*, the natural son of *George Conrad*, against the administrators of his father, in which a declaration was filed, containing two counts: 1st. Upon a special agreement, that if the plaintiff would live with the intestate, and work his plantation for six years, the intestate would give and convey to him 100 acres of the land. 2d. Upon a *quantum meruit*, for work and service. Pleas, *Non assumpsit*, and the statute of limitations.

Upon the trial of the cause, it was proved, that *Jacob Conrad* having expressed an intention to leave his father's and learn a trade, the father said to him, with some solicitude, "Stay and "work the plantation till you are of age, and I will give you a "hundred acres of it." It also, appeared, that *Jacob* did remain with his father, and worked the plantation ably and diligently; that the father had three legitimate children, two sons and a daughter, and three illegitimate children, *Jacob*, and two daughters; that the two legitimate sons worked with *Jacob* on the plantation; that the father once intimated an intention of putting *Jacob* on footing with his other children; that the plantation consisted of about 260 acres, and was appraised at 750*l*.; and that *Jacob Conrad* was well maintained, clothed, and schooled, while he remained with his father.

For

For the defendants, it was urged, that the action was a novelty; that, on general principles, the service of a minor child, (whether legitimate, or not) was due to the parent, in consideration of his maintenance and education; and that the supposed special contract was unreasonable, and, consequently, void. 1 *Black. Com.* 449. 453. 450. *Yelv.* 17. 2 *Stra.* 728. *Doct.* and *Stud.* 211, 212. If, therefore, the plaintiff is entitled to recover any thing, it must be on the count for a *quantum meruit*, when, considering him as a servant, the expense incurred for his cloathing and education must be set off against a claim for wages. 1793.

For the plaintiff, it was answered, that the contract was expressly proved, upon a good and valuable consideration, performed by the plaintiff; and that considering the rights of a bastard in relation to the father's estate, to be only such as he could himself acquire, the Court would be anxious to support so meritorious a claim. 1 *Black. Com.* 459.

By the COURT: This is an action to recover damages, for the non-conveyance of 100 acres of land, agreeably to an express promise of the intestate; with respect to which the evidence certainly supports the declaration. Considering, however, the relation of the parties, the other parental obligations of the intestate, and the extent of the property, it would seem rather excessive to give the full value of the land in damages for a breach of the promise. Is there, then, any thing in the evidence, that will warrant the jury, in departing from that strict standard of the damages? We think there is. The father's intimation, that he would place *Jacob* on a footing with his other children, may be fairly construed as a promise, (explanatory of what he had before said) that he would give him a child's share of the estate. If the jury adopt the construction, however, the other illegitimate children must be put out of the calculation. On this principle one fifth, would entitle him to a verdict for 150*l.* As to interest, it will depend upon the discretion of the jury: but if the eldest son took the estate, at the valuation, he must have paid interest to the younger children; and, consequently, on the ground of equality, it would be right to allow it to the plaintiff.

Verdict for the plaintiff 145*l.* damages. (1)

C. Hall, *C. Smith*, and *Hartly*, for the plaintiff.
J. Smith, *Duncan*, and *Tilghman*, for the defendant.

(1) This cause was tried at *York Town*, *N. P.* before SHIPPEN and BRADFORD, *Justices*, in *May* 1793.

1793.

Edgar's Lessee *versus* James Robinson, junior, and William Robinson.

EJECTMENT, tried at *York-Town*, in which defence was taken for one-third part of the premises. The title of the lessor of the plaintiff was deduced from a patent, dated the 10th of *June* 1734, to *Thomas Lenton*, who conveyed, on the 8th of *January* 1741, to *James Rowland*, and *James Rowland* afterwards conveyed to *Robert Rowland*, who devised the premises to his sons *James*, *John*, and *Matthew*, by a will dated the 9th of *January* 1779. A sheriff's deed was then read, dated the 29th of *April* 1785, which recited a judgment and execution, at the suit of *Andrew Leiper* against *Matthew Johnston* and *James Robinson* for 30*l.*; and a sale of one-third part of the land, as the estate of *James Robinson*, to *Samuel Edgar* (the lessor of the plaintiff) for 40*l.* And parol evidence was offered to show, that *James Rowland* had conveyed one-third of the premises to *James Robinson*, senior, (uncle of the defendants) who was the defendant in a former ejectment; and who was in possession of the land at the time of the judgment and sale. It was, thereupon, objected, that no parol proof could be given of a conveyance of real estate; nor, generally, of any instrument, without previous notice to produce it.

But, by the COURT: The present defendant, *James Robinson*, junior, is not the party to the alleged deed; and, therefore, no notice could be given to him, within the general rule, for the production of deeds: nor, if he stands merely in the character of a witness to the deed, is he compellable to produce it. There is, therefore, no way of getting at the title, but the one proposed, if the defendant in an action, chuses, under such circumstances, to conceal the muniments of the estate.

The witnesses were, accordingly, examined; and the plaintiff obtained a verdict, conformably to the charge of the Court.

Zantzinger *versus* Ketch.

THIS was an action of debt on articles of agreement to pay 135*l.*, in two instalments, for lands bought by the defendant from the plaintiff; and in the articles it was stipulated, that "the deed of conveyance shall be made to the said *Michael* "*Ketch* at the first payment."

The defendant offered the parol testimony of a witness, who was present at the execution of the articles, to shew that by the expression, "the deed of conveyance," the parties meant and understood, "a deed conveying the land free of all incum-
"berances."

"berances." 2 *Vez.* 299. *Hurst* v. *Fell*, in the Supreme Court of *Pennsylvania*. 1793.

The evidence was opposed, as tending to contradict the deed, whose expressions were clear, and did not require explanation.

The COURT, however, upon the authority of *Hurst* v. *Fell*, admitted the evidence, though with great reluctance; and declaring that they would reserve the point. But as the verdict was for the full amount of the plaintiff's demand, the question was not revived. (1)

C. Smith, for the plaintiff.
Hamilton, for the defendant.

Eddowes *et al. versus* T. Niell.

THIS was an action on the case, for goods sold and delivered to *William Niell*, upon a special *assumpsit* by the defendant, *Thomas Niell*, to guarantee the payment of the price. Pleas, 1st. *Non assumpsit*, on which issue was joined; and, 2d. The statute of limitations, to which, resident beyond seas, was replied, &c.

The plaintiffs were *British* merchants, from whom *William Niell*, a trader in *Baltimore*, was accustomed to import goods. On the 14th of *January* 1771, his brother, the defendant, wrote a letter to them, in which he said, "that to strengthen his bro-"ther's credit, he would guarantee all his dealings with their "house." Several shipments of goods were made both before, and after, the receipt of this letter; and *William Niell* continued to make payments on account, till the year 1775, when the revolutionary war began its agitations; and all commercial and amicable intercourse, between *Great Britain* and the *United States*, was suspended until the peace of 1783. In the year 1784, the plaintiffs sent a power of attorney to collect the debts due to them here; their agent applied to *William Niell* who acknowledged the justice of the debt; but claimed an abatement of eight years interest, on account of the war; and a further credit upon giving his bond for the amount; which the agent refused. In 1785, *William Niell* died, leaving the defendant his executor; to whom, in that character, the agent of the plaintiffs applied for payment; and he answered, by admitting the claim, and recommending a suit against the estate. No demand, however, was made, on the ground of the defendant's guarantee, till about the time of commencing the present action, in *January* 1790.

(1) This cause was tried at *Carlisle*, *Nisi Prius*, on the 15th of *May* 1793, before SHIPPEN and BRADFORD, *Justices*.

On

1793. On these general facts, the plaintiffs' counsel contended, 1st. That the demand was fair and legal, founded upon an unequivocal letter of credit, applicable, in its terms and meaning, as well to shipments made before, as after, it was received. 2d. That it was not necessary to render the letter binding on the defendant, that the plaintiffs should answer it; nor that they should give notice to him of a default, (as in the case of bills of exchange) at any period of the transaction. 3d. That there was no express waiver of the guarantee; and nothing can be implied, even in favour of a surety, since no new security was taken; nor any negligence shown, in omitting to prosecute the principal, upon the demand of the surety.

For the defendant it was urged, 1st. That the demand was a harsh and stale one; founded on a letter, which had not, in fact, created any additional confidence, or credit; the receipt of which had never been acknowledged; and the responsibility of which had never been suggested, for more than nineteen years. 2d. That the guarantee ought not to receive an indefinite interpretation; but to be regarded as a credit, according to the course of the *American* trade, for a year; and to forbear a suit for so long a time, during the life, and after the death of the principal, was, in fact, giving a new and independent credit; which is tantamount to a release of the surety. 3d. That although the statute of limitations may not apply, as a plea in bar (the plaintiffs residing abroad) the lapse of time furnishes a presumption, that the defendant's letter never was accepted, or relied upon, as a guarantee. 4th. That, on the most rigid construction, the guarantee can only apply to future, not to past, transactions. And on these points, respectively, the following books were cited: 1 *T. Rep.* 167. 2 *Br. Ch.* 579. 2 *T. Rep.* 366, 370. 1 *Pow. Cont.* 287. *Ibid.* 8, 9, 10.

By the COURT: Letters of credit are a common, and useful, instrument in the course of commerce. They are, however, of a very serious nature; and the writer is bound to comply with the contents, according to their genuine and honest import. In order to render them obligatory as a contract, it is not necessary, that they should be answered, if credit is given upon them. Like the case of transmitting a bond in a letter, acquiescence and acceptance are implied, in the silent receipt of the instrument.

It has been urged, that the lapse of nineteen years, without notice of a default in payment by the principal, is a virtual abandonment of all recourse to the surety; on the principles applicable to bills of exchange, and to other negotiable instruments. But there is no analogy between the cases; for, the engagement of the letter of credit extends, in its very nature, to various future transactions, without reference to time, or amount. It is true, however, that the gross negligence of a creditor, even of the obligee

obligee in a bond, may operate to discharge a surety; as where the obligee is requested by the surety to proceed against the principal, in order to save the debt; if he neglects or refuses to do so, the surety, both in law and equity, will be exonerated; and this is the case in 2 *Brown's Chancery Reports*, 579. But does the evidence in the present action, justify an adoption of the rule? From the years 1771 and 1772, when the shipments were made, until the year 1775, when payments were first suspended, there could be no reason for calling on the defendant. From 1775, till the peace of 1783, the debtor was guilty of no default, which would warrant an application to the surety; for, he was prevented, by the war, from corresponding with the creditor, and making any payment, or remittance, on account of the debt. As soon as the peace had restored the intercourse between the parties, the creditor applied for payment to the debtor, who acknowledged the debt; claimed an abatement of interest; and made some overtures for a settlement; but died in the next year, without affecting any thing in that respect. The agent of the plaintiffs then addressed the defendant, not as surety, but as executor, of his brother; and, indeed, it does not appear, that the agent knew of the letter of credit, till sometime afterwards. 1793.

On this review of the facts, we cannot perceive any culpable negligence, on the part of the plaintiffs, in pursuing their original debtor: nor is it clear, that they had any right to call upon the defendant, as a surety, until they had failed in their endeavours to recover from the principal; or the principal had become notoriously insolvent. The want of notice, therefore, in such a case, and under such circumstances, does not, in itself, furnish a bar to the demand; and although, in some instances of debts, a lapse of time will warrant a presumption of payment; yet, from the nature of this contract, no such presumption can arise here.

Verdict for the plaintiffs. (1)

Tilghman, and *Bowie*, for the plaintiffs.
Ingersoll, *Smith*, and *Duncan*, for the defendant.

(1) This cause was tried at *York-Town*, *Nisi Prius*, on the 22d of *May* 1793, before SHIPPEN and BRADFORD, *Justices*.

SUPREME COURT

OF

PENNSYLVANIA.

January Term 1794.

Schenkhouse *versus* Gibbs *et al.* (1)

CASE. The facts, on which the present cause depended, will be found in the report of *Ingraham*, indorsee, v. *Gibbs et al.* 2 *Dall. Rep.* 134.; and the note annexed to it. *Ibid.* 136. The following charge was delivered to the jury.

By the COURT: We are of opinion, that the mode of remitting by a general bill, payable to one merchant, with separate drafts in favour of each of the other merchants, who are interested in the amount of the bill, is a good and lawful execution of the trust and authority of a factor, employed by several distinct and unconnected merchants, resident abroad. No inconvenience can arise from the transaction, if all the parties are apprised of the distributive appropriation. It is essential, however, to such a remittance, that notice should be given to the parties. In the present case, there is no proof of express notice to the plaintiff; but this may be supplied by facts, which raise a fair presumption of the plaintiff's knowledge on the subject: and his delay in protesting and returning the bill, together with the draft on *Portener*, sent directly by the defendants to him, are facts of that description.

It only remains to observe, that *Portener*, the general trustee, could give no preference to any claimant on the fund; and that in case of a partial loss, it must have been borne, as a general average, by all the concerned.

Verdict for the defendants.

(1) An outline of this case was annexed in a note to the case of *Ingraham* v. *Gibbs et al.* 2 *Dall. Rep.* 134.; but it was thought of some importance to add the opinion expressed by the Court on the trial.

1794.

M'Ewen *versus* Gibbs *et al.*

CASE, on a parol acceptance of a bill of exchange. The plaintiff, having become a certificated bankrupt, was called as a witness to prove the acceptance. *Dallas* objected to his competency, on the ground of the witness's liability for costs; and his interest in augmenting the estate surrendered under his commission.

But it appearing, that the assignees carried on the suit, and had entered into security for costs, the COURT (after the plaintiff had released his interest at the bar) directed him to be sworn, upon the authority of *Scott* v. *M'Clenachan*.

SUPREME COURT

of

PENNSYLVANIA.

April Term 1794.

Boyd's Lessee *versus* Cowan.

EJECTMENT, tried at *West-Chester*, in *Chester* county, on the 22d of *October* 1793. The jury gave a verdict, in favour of the plaintiff, for the premises mentioned in the declaration; and, also, for 41*l.* 13*s.* 4*d.* damages, being the value of the mesne profits; subject to the opinion of the Court on a point reserved; to wit: Whether the mesne profits can be recovered in an ejectment, by way of damages? After argument, when the Judges were about to deliver their opinions, the parties made an amicable settlement of their dispute: but the general question being of importance, no excuse will be offered, for inserting here, the opinion prepared by the Chief Justice.

M'KEAN, *Chief Justice.* In delivering my sentiments upon the point reserved in this cause, I shall first consider the objections made to the recovery of the mesne profits, in the action of ejectment; and then, the reasons in favour of such a recovery.

1st. The leading objection (and which at first sight appears the strongest) is, that the action of trespass for the mesne profits, is always laid with a continuando; thus differing from the form of the action of ejectment, which alleges only a single act of entry and ouster. For which 3 *Blackst.* 205. 3 *Wils.* 118. 2 *Bac. Abr.* 181. and *Runnington*, 4, 5. 44. and 164. have been cited.

2d. Special bail can be required in the action of trespass for the mesne profits, but not in the ejectment. 2 *Barns*, 59.

3d. If damages are given for the mesne profits in the ejectment, and an action of trespass shall afterwards be brought for the same cause, the former cannot be pleaded in bar.

4th. The law has been against this practice, and cannot now be altered except by the legislature.

5th. It

5th. It would be inconvenient to allow the practice; because titles are frequently so complicated and difficult, as sufficiently to command the whole attention of the jury; and it would be too burthensome to impose upon them, also, the ascertaining the value of the mesne profits by one verdict. 1794.

This is the amount of all that has been, or, I believe, that can be urged against the measure. My answer to the first objection is, that I agree that the form of the writ and declaration in an action of trespass for the mesne profits contains a *continuando* of the trespass, and that it cannot be charged but by positive law. This prevents the necessity of several actions of trespass, for every several trespass; and unless it is so laid, it no where appearing on the record that the trespass was continued for a certain time, it must be taken by the Court and jury to be for a single act, and damages can be given for nothing more. But in an ejectment there is no arrest, no writ, and the form of the charge in the declaration in the King's Bench in England is, "that the defendant entered into the tenements, &c. of the plaintiff with force and "arms, &c. and ejected, expelled, and removed him; and him "being so ejected, expelled and removed, the defendant hath "hitherto withheld from him, and still doth withhold, the possession, &c." *Jacob's Law Dictionary*, title Ejectment, 1 *vol. Attorney's Practice in K. B. page* 424. 440. *Lill. Ent.* 192. 205. Besides, it sufficiently appears on the whole record in the ejectment, that the plaintiff was in possession, that the defendant ousted him on a certain day, and detained the possession until the trial; so that the action is not for a single act of trespass; and, therefore, the jury may well give damages for the whole time the wrong continued. At all events, the precedent may be so made, in the Common Pleas, as well as in the Supreme Court.

With respect to the second objection, that special bail can be required in the action of trespass for the mesne profits, but not in the ejectment: it is true, that, upon affidavit, the Court of Common Pleas in England has ruled special bail in the action of trespass for mesne profits, though it has been held otherwise in the King's Bench. *Register of Common Pleas*, 62. However, there appears to be no weight in this, when it is considered, that this action is brought after the ejectment is determined, so that the plaintiff is in no worse condition (although he has no special bail in the ejectment) on that account, but rather a better; for, if the value of the mesne profits is recovered in the ejectment, he may have a *fieri facias* for them immediately. If, too, the defendant should, before execution executed, withdraw his person and effects from the jurisdiction of the Court, the plaintiff would still be left in a better situation; for, if he pursues the defendant, he may arrest him in an action of *debt* on the judgment in any of the *United States*; whereas, in such a case, no action of trespass for the mesne profits could be brought (it being a local action) in a foreign country, and bail demanded.

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1794. In answer to the third, I will only mention, that nothing appears plainer, than that the defendant may plead the recovery of the damages in the ejectment; with an averment that they were given for the mesne profits, in bar of the action of trespass. 1 *Leon.* 313. *Ca.* 437. 3 *Leon.* 194. *Ca.* 242.

The fourth objection, that this Court cannot alter the *law*, is correct beyond controversy; but there is no positive law respecting this action, or directing that the mesne profits shall not be recovered in it, as well as possession; and the Court can alter the *practice*, and institute any rules in an action of ejectment, which they may deem beneficial, or for the furtherance of justice, without legislative aid.

An ejectment is the creature of *Westminster Hall*, and has been gradually moulded into a course of practice by the *rules* of the Courts. It is in form a fiction; in substance, an action invented for the speedy trial of titles to the possession of lands. For a long time, damages only could be recovered in this action, the measure of which was always the mesne profits. 3 *Wils.* 118. 120. In the 14 *H.* 7., and not before, the term or thing as well as damages were allowed to be recovered. At first there was a lease really sealed on the land, and the action was against the real tenant in possession. It came in place of the assize, in which action the possession, as well as the mesne profits, was recoverable. Afterwards, casual ejectors were set up; and notice ordered to be given to the tenant in possession. Then the new practice was invented by Chief Justice *Rolles*. Not very long ago (in 1751) it was ruled in the Common Pleas, that if after a recovery in ejectment against the defendant, he should bring a writ of error, he should give bail to the plaintiff in a sum equal to the value of at least two years mesne profits. 2 *Barn's Notes*, 86. Many other alterations have taken place; and the *same authority* which brought it *thus far*, may certainly carry it to a higher degree of perfection, as experience happens to show inconveniences, or defects. Being under the controul of the Court, it may be modelled so as to answer, in the best manner, every end of justice and convenience. 3 *Burr.* 1292. 1295. 3 *Blackst. Com.* 205. 2 *Burr.* 660. Besides, by the 6th section of the act of assembly, intitled, "An act for the more speedy and effectual administra- "tion of justice," it *is declared* and enacted, that "the justices "of the Supreme Court have full power and authority to make "such rules for the regulating the practice of the said Court, "and expediting the determination of suits, as they in their dis- "cretion shall judge necessary." Of the power of the Court, therefore, in this particular, I entertain no doubt.

I shall now, briefly, consider the *argumentum ab inconvententi;* which refers but to a single instance; to wit, the difficulty the jury may labour under, in deciding on the titles of the parties to the possession, and, at the same time, in fixing the value of

of the mesne profits, if the verdict shall be for the plaintiff. There can be no great hardship in this. In actions of waste, dowry, assize, and all others, where the thing itself, as well as the damages, is recovered, the jury are liable to the same inconvenience: nor can I perceive any great perplexity, that can arise in determining the rent, or annual value, of a house, or parcel of land, when complete evidence is given of it. 1794.

It appears to me, that the inconvenience, or hardship, is the other way. After a person has been unlawfully kept out of his house, or land, for a series of years, and undergone great trouble and expense, in recovering a judgment for them; to give him the possession *merely*, without any satisfaction for the use and occupation pending the action, does not seem to be complete justice. To tell him, "You must sue for the mesne profits in a "new action, fee counsel, attend the Courts, produce witnesses, "and have a new trial for the *sole* purpose of fixing their value," is certainly imposing an improper burthen upon *him*, if justice can be had in a more speedy, cheap, and easy way. Taking a verdict for the amount of the mesne profits, as well as on the title in the ejectment, will prevent this circuity, delay, and expense; and I believe it to be equally beneficial for the defendant: for, if on the trial he shows a reasonable ground for controverting the plaintiff's claim, or a specious title in himself, a jury would be inclined to give but very moderate damages against him (of which the jury in the action for the mesne profits can have no consideration, as the title cannot in that action be again gone into) and he would certainly be saved the costs and expenses of the second suit.

It is in argument, in law, and in logic, as it is in nature (*destructio unius, est generatio alterius*) that the destruction of an objection, begets a proof. I shall, however, proceed to consider the arguments and proofs on the other side of the question. This improvement of the action of ejectment has been suggested by the Court in the case of *Treherner* v. *Gressingham*. 2 *Barn's Notes*, 59. 1 *Lill. P. R.* 680. *Whitefield's case*, *Buller's Nisi Prius*, 88. There has been no judicial opinion given on this subject, in the Supreme Court of *Pennsylvania*, prior to the revolution, that I have heard of, unless it was in the case of the *Lessee of James Dixon* v. *Thomas Hosack* tried on the 15th of *April* 1775, when 41*l.* were awarded for the plaintiff: but such an opinion has been given in *Delaware* above thirty years ago; and the general practice in that state, has been ever since, to take a verdict for the mesne profits, in the action of ejectment. Nay, my memory does not serve me in recollecting a single instance, where an action of trespass, for the mesne profits, has been brought in *Delaware*, from the time mentioned; though, without doubt, it might have been done. There has been no similar precedent in *Pennsylvania* since the revolution; but, on the other hand, it has been recommended

1794. mended more than once in the Supreme Court of this state, to take a verdict for the mesne profits in the ejectment: and the point now before the Court was argued, and the same case cited, by Messieurs *Tilghman* and *Sergeant*, in the case of *William Tharpe* v. *John Bell*, of *September* term 1787, when judgment was given in favour of the measure. So, in an ejectment, on the demise of *Jasper Yeates*, Esq. and others v. *Charles Stewart*, which was tried at *Nisi Prius* at *Chambersburgh*, for the county of *Franklin*, in *June* 1789, a verdict was taken for 130*l.* damages for the mesne profits; and a judgment rendered upon it, for the plaintiff, in bank.

Upon the whole, as it appears, that this Court has the power of allowing a verdict to be given for the mesne profits, as damages in the ejectment; as the judges in *England*, so late as the year 1742, could see no reason why it should not be done; as it has been in use for many years in the state of *Delaware*, under *similar authority*, and no inconvenience from the practice has hitherto been there discovered; as it has been in precedent in this Court by judicial decisions; and as it is calculated, in my judgment, for the reasons assigned, to answer more fully the ends of justice and convenience, by avoiding unnecessary delay, a circuity of action, and a double expense to suitors; I still must hold the opinion, which my former brethren, as well as myself, unanimously, entertained upon the subject. If it shall be thought best by the Court, that plaintiffs in ejectments should in all cases be turned round to an action of trespass, for recovering the mesne profits; yet, after what has passed, on former occasions, I conceive it ought not to be the rule in this action; but should be applied only to future cases: because, at the present moment, the law in *Pennsylvania* is, that the verdict in this action is regular, and agreeable to the practice of the Supreme Court. *Est boni judicis ampliare justitiam.*

SUPREME COURT

OF

PENNSYLVANIA.

September Term 1794.

The Commonwealth *versus* Chambrè.

A *HABEAS corpus* was issued to the jailor of *Philadelphia*, to bring before Judge SHIPPEN, the bodies of *Magdalen* and *Zare*, two negro women, committed as the absconding slaves of Mrs. *Chambre*. The Judge, after hearing the case opened, adjourned it, for argument and decision, to the Supreme Court, on the 13th of *September* 1794, when the following facts appeared:

Mrs. *Chambrè* was a widow lady, in the island of *St. Domingo*, and owned the negroes in question as slaves; but on the conflagration at *Cape Francois*, she fled, bringing them with her, to *Philadelphia*; where she resided five *calendar* months and three weeks; a period that exceeds six *lunar* months, in computation of time. She then removed with the negroes to Burlington, in the state of *New-Jersey*, designing, as it was suggested, to avoid the operation of the act, for the gradual abolition of slavery; but no proof was offered, that she had ever intended to *settle* in *Pennsylvania*. The negroes absconding from Mrs. *Chambrè*, came to *Philadelphia*; and now they asserted their freedom, under the 10th section of the act, which declares all unregistered negroes and mulattoes to be free, "except (*inter alia*) the domestic "slaves attending upon persons passing through; or sojourning "in this state, and not becoming resident therein: provided such "domestic slaves be not aliened, or sold to any inhabitant, nor "retained in this state longer than six months." 1 *vol. State Laws*, 841. *Dall. edit.*

For the negroes, it was contended, that, upon authority, the general legislative expression, must be construed to mean *lunar*, and not *calendar*, months: for which were cited, 5 *Co.* 2. *Cro. J.* 167. 1 *Stra.* 446. 2 *Bl. Com.* 141. 3 *Burr.* 1455. *Doug.* 446. 463.

1794. 463. And that, even if the computation by calendar months were more usual at common law, a different construction would be adopted in favour of liberty, and to prevent an evasion of the most honourable statute in the *Pennsylvania* code. *Harg. Co. Litt.* 145. *b.* (2)

But the COURT (stopping the counsel for Mrs. *Chambrè*) said, that they were, unanimously, of opinion, that the legislature intended calendar months; that the same expression, in other acts of the general assembly, has uniformly received the same construction; *Brudenell et al.* v. *Vaux et al.* (1) that there was nothing illegal, or improper, in the conduct of Mrs. *Chambrè*, on the occasion; and that, therefore, the negroes must be remanded into her service.

Lewis, *Ingersoll*, and *Franklin*, for the negroes.
M. Levy, for Mrs. *Chambrè*.

(1) This case has been reported in 2 *Dall. Rep.* 302.

SUPREME COURT

OF

PENNSYLVANIA.

September Term 1795.

Respublica *versus* Mulatto Bob.

INDICTMENT for murder of the first degree. The charge of the COURT was delivered by the *Chief Justice*, who stated the facts and the law to the following effect: (1)

M'KEAN, *Chief Justice.* The evidence in this case may be comprised in a few words. It appears, that a wedding being fixed for *Easter Monday*, a considerable number of negroes assembled; and, about 10 o'clock at night, a quarrel arose between mulatto *Bob*, the prisoner at the bar, and negro *David*, the deceased. For awhile, the parties fought with fists; and the prisoner was heard to exclaim "Enough!" The affray, however, became general, and continued so for some time. When it was over, the prisoner went to a neighbouring pile of wood, and furnished himself with a club. He was advised not to use it, but he declared that he would, and entered the crowd with it in his hand. After remaining there about ten minutes, he left the crowd, without his club; and, again repairing to the wood-pile, took up an axe. Being, likewise, dissuaded from returning to the crowd with the axe, he said "he would do it; and striking the instrument, with great passion, into the ground, "swore, "*that he would split down any fellows that were saucy.*" Accordingly, he mixed once more among the people; a struggle

(1) During the trial the counsel for the prisoner offered a negro slave as a witness in his favour; but, the attorney-general objecting to his competency, he was rejected, without argument: and it was said by M'KEAN, *Chief Justice*, That it was a settled point at common law, that a slave could not be a witness, because of the unbounded influence of his master over him; which was, at least, equal to duress: that the act of assembly was in aid of the common law, not to change its principles: and that it would be difficult to administer an oath to a slave, for want of knowing any religion he professed.

1795. was immediately heard about the axe; the prisoner then struck the deceased with it on the head; the deceased fell; and as he was attempting to rise, the prisoner gave him a second blow on the head with the sharp edge, which penetrated to the brain. After languishing three days, death was the consequence of this wound.

From these facts, we are to inquire, what crime the prisoner has committed? Murder, in the first degree, is the *wilful*, *deliberate*, and *premeditated* killing of another.* There are various inferior kinds of homicide; but, on the present indictment, our attention is confined to a consideration of the highest, and most aggravated, description of the crime. Then, let us ask, did the prisoner *wilfully* kill the deceased? It is not pretended, that there was any accident in the case; and, therefore, the act must have been wilful. Was the killing *deliberate* and *premeditated?* or was it the effect of sudden passion, produced by a reasonable provocation? There had been a combat with fists; but this was over, when the prisoner, without any new provocation, first procured a club, and, losing that weapon, afterwards armed himself with an axe. It cannot surely be thought, that the original combat, was a sufficient provocation for the prisoner's taking the life of his antagonist. An assault and battery may, indeed, be resisted and repelled, by a battery more violent; but the life of a fellow creature must not be taken, unless in self-defence.

It has been objected, however, that the amendment of our penal code, renders *premeditation* an indispensable ingredient, to constitute murder of the first degree. But still, it must be allowed, that *the intention* remains, as much as ever, the true criterion of crimes, in law, as well as in ethics; and the intention of the party can only be collected from his words and actions. In the present case, the prisoner declared, that he would split the skull of any fellows who should be saucy; and he actually killed the deceased in the way which he had menaced. But, let it be supposed, that a man, without uttering a word, should strike another on the head with an axe, it must, on every principle by which we can judge of human actions, be deemed a premeditated violence.

The construction which is now given to the act of assembly on this point, must decide, whether the law shall have a beneficial, or a pernicious, operation. Before the act was passed, the prisoner's offence would clearly have amounted to murder; all the circumstances, implying that malice, which is the gist of the definition of the crime at common law: and if he escapes with impunity, under an interpretation of the act, different from the one which we have delivered, a case can hardly occur to warrant a conviction for murder in the first degree.

* See *Penn. Laws*, 3 *vol.* 599, 600. *s.* 2 *Dall. edit.*

Tenderness

Tenderness and mercy are amiable qualities of the mind; but if they are exercised and indulged beyond the controul of reason, and the limits of justice, for the sake of individuals, the peace, order, and happiness of society, will inevitably be impaired and endangered. As far as respects the prisoner, I lament the tendency of these observations; but as far as respects the public, I have felt it a sacred duty to submit them to your consideration. 1795.

Verdict, guilty (1).

Holloback *versus* Van Buskink, surviving Administrator, &c.

Racroth *et Ux.* *versus* The Same.

THESE were actions on the case, in which the plaintiffs declared on a general *indebitatus assumpsit*, for money had and received by the defendant (who was the surviving administrator, *cum testamento annexo*, of *Catharine Holloback*) to their use, respectively. They claimed distributive shares in the *residuum* of the estate of *Catharine Holloback*, under her will: but it was questioned, whether such actions would lie, without proving an assumption, on the part of the defendant?

The COURT, however, declared their opinion, that the actions might be maintained, without proof of an express *assumpsit;* and verdicts were, accordingly, given for the plaintiffs, with leave to move for new trials.*

Anonymous.

THIS was an action on the case for obstructing a water course, by which the plaintiff's meadow was watered. On the trial, it appeared, that the defendant had purchased a mill, with notice that the vendor had before sold the meadow in question to the plaintiff, covenanting that the plaintiff might use the water, over and above what was necessary for the mill. The defendant obstructed the water course; and it seemed to have been his object, by so doing, to compel the plaintiff to sell the meadow to him.

On these facts, the COURT recommended (with the concurrence of the counsel on both sides) that the defendant should do

(1) This indictment was tried at *Easton*, on the 21st of *June* 1795, before M'KEAN, *Chief Justice*, and SMITH, *Justice*.

* Decided before YEATES and SMITH, *Justices*, at *Northampton*, *Nisi Prius*, in *October* 1795.

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1795. an act of justice, in securing to the plaintiff, by deed, the enjoyment of the water course; but he obstinately rejected the proposition. The plaintiff's counsel, thereupon, executed and filed a writing, by which they bound their client to release any damages that the jury might give, in case the defendant should execute such a deed as the court had proposed: and the COURT advised the jury, on this condition, to find the full value of the meadow in damages; which was, accordingly, done.

Sitgreaves and *Thomas*, for the plaintiff. *Ingersoll* and *Clymer*, for the defendant.*

* Decided before YEATES and SMITH, *Justices*, at *Northampton*, *Nisi Prius*, in *October* 1795 In delivering the charge to the jury, Mr. *Justice* YEATES referred to a similar case, before the *Chief Justice* and himself, in which the Court had given, and the jury had adopted, the same advice.

SUPREME COURT

OF

PENNSYLVANIA.

December Term 1796.

Graham *versus* Bickham.

THIS was an action on the case for damages, which were laid at 10,000*l.* in the declaration, founded upon the following agreement, signed by the defendant:

"I do certify, that I have bought of *William Graham* "17,344$\frac{76}{100}$ dollars, six per cents of the *United States*, to be "delivered to me on the 1st of *July* next, on my paying to "him, on or before transferring the same, the sum of 22,318$\frac{49}{100}$ "dollars in specie. And for the faithful performance of the "above agreement, I bind myself, my heirs, and executors, in "the sum of 1000*l.* lawful money of *Pennsylvania*, to be paid to "said *Graham*, or his order, in case the same is not fully com- "plied with by me. *Philadelphia*, 17th *January* 1792."

On the trial of the cause, a verdict was given, in favour of the plaintiff, for 1798*l.* 17*s.* 7*d.*, subject to the opinion of the Court, on the question, whether the plaintiff could recover more than 1000*l.* in an action upon this agreement?

The case was argued by *E. Tilghman* and *Ingersoll*, for the plaintiff, on the position, that unless a certain sum is agreed by the parties to be paid and received, at all events, as the measure of damages, the plaintiff may waive the penalty of the agreement, and proceed for damages according to the actual injury. 4 *Burr.* 2228. 2 *Atk.* 371. 1 *H. Black.* 232. 1 *Bl. Rep.* 395. 373. 2 *Atk.* 190.

Lewis and *Rawle*, for the defendant, insisted, that the contract ought not to be enforced beyond the meaning and understanding of the parties; which was, obviously, to fix a sum, as the extent of the defendant's responsibility, in case of a non-compliance

1796. pliance with his engagement. 16 *Vin. Abr.* 301. "*Penalty.*" *pl.* 3. 5. 10.

By the COURT: The substance of the agreement between the parties was, to buy and sell stock. The penalty was merely superadded as a security for performance; and not as a sum to be paid and received absolutely in lieu of performance. The plaintiff is entitled (notwithstanding the penalty) to recover damages, commensurate with the injury suffered by a non-performance. The judgment must, therefore, be rendered in his favour, for the full amount of the verdict.

SUPREME COURT
OF
PENNSYLVANIA.

March Term 1796.

Febeiger's Lessee *versus* Craighead.

AT a Court of *Nisi Prius*, held at *Carlisle*, a case was stated for the opinion of the Court, containing these facts: A tract of land, in *Cumberland* county, was mortgaged by *John Glenn*, to the trustees of the loan office (whose rights, powers, and duties, have been transferred by law to the plaintiff, as state treasurer) and the land was afterwards levied upon, and sold at a sheriff's sale, to the defendant, by virtue of a subsequent judgment and execution. The question is, whether the mortgage remains a lien upon the land, against the purchasor at sheriff's sale?

By the COURT: The case admits of no doubt. Judgment must be entered for the plaintiff.

Ingersoll, attorney-general for the plaintiff.
Lewis, for the defendant.

Bank of North America *versus* Wycoff.

CASE, by the indorsee against the payee and indorser of a promissory note, drawn by *Joseph Harrison*.

The question was, whether the defendant had received notice within a reasonable time, of the non-payment of the note by the drawer? *Jacob Lawerswyler*, the runner of the bank, was called as a witness to prove the notice; but, after a long examination in chief, he stated, on his cross examination, "that he was the "executor of *Jacob Winney*, a stockholder in the bank of *North* "*America*; and was entitled to a share in the residuum of the "testator's estate."

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1796. The defendant's counsel then objected to the competency of the witness, on account of his interest in the bank. They insisted, that although this appeared after a cross examination, it was sufficient for the rejection of his evidence altogether; and, that, consequently, as there was no proof of notice, independent of his evidence, the plaintiff must be nonsuited.

The COURT concurring, clearly and explicitly, in the opinion of the defendant's counsel,

The plaintiff suffered a nonsuit.

Bell *versus* Andrews,

THIS was an action on the case, to recover damages, for the breach of an agreement to sell and convey to the plaintiff, in fee simple, a tract of land in *Westmoreland* county.

The plaintiff offered parol evidence of the agreement, as stated in the declaration; of a payment of the price of the land; of the defendant's subsequent acknowledgment of the sale and payment; and of the defendant's refusal to execute a conveyance.

The defendant objected to any proof of a parol agreement, for the sale of lands in fee simple, as the act for prevention of frauds and perjuries (1 *State Laws*, 640. *Dall. edit.*) required, expressly, that all such agreements, to have the full effect, must be put in writing, and be signed by the parties, or their agents.

But, by the COURT: The payment of the consideration money, may, certainly, be proved by parol evidence. The agreement, being then executed by one of the parties, is not affected by the act of assembly; and it is settled, that the *English* statute against frauds and perjuries, was never extended to *Pennsylvania*. The act of assembly does not make a parol agreement, for the sale of lands, void; though it restricts the operation of the agreement, as to the acquisition of an interest in the land, and no title in fee simple can be derived under it. But, certainly, an action will lie to recover damages for the non-performance of such an agreement.

The objection to the evidence over-ruled.

SUPREME COURT

OF

PENNSYLVANIA.

December Term 1797.

Stroud, Assignee, &c. *versus* Lockart *et al.*

SCIRE facias on a mortgage. The mortgage had not been recorded, conformably to the act of assembly; and *Lockart* had purchased the premises. But, on the trial, the plaintiff proved, that *Lockart* knew of the existence of the mortgage at the time of his purchase, and said he would have to pay it, although it was not then recorded.

By the COURT: The case is too plain for controversy. The plaintiff must have a verdict; and all the trouble of the jury will be to calculate the interest.

Verdict for the plaintiff.

Seagrove *versus* Redman *et al.*

THE plaintiff resided in the *Havanna*, and was the agent of the defendants in fitting out a privateer for them, during the war. On the trial of this cause, he produced, and swore to the authenticity of, his book of original entries (some of which were made in his own hand-writing, and some in the hand-writing of a clerk) to prove the disbursements for the privateer.

And the COURT admitted the evidence, after opposition, upon the principle, that as it related to a mercantile transaction, which took place in a foreign country, a relaxation of the strict rules of the common law, was reasonable, just, and necessary.

SUPREME COURT

OF

PENNSYLVANIA.

December Term 1798.

Nicholson's Lessee *versus* Wallis.

THIS cause had been decided, by the board of property, in favour of the defendant, upon a *caveat*, respecting lands in *Northumberland* county, on the 14th of *February* 1796; but the patent was staid for six months, within which time, the party is allowed, by the act of assembly, to enter his suit, at common law, in the nature of an appeal. 3 *State Laws*, 213. *s.* 11. *Dall. edit.* For that purpose, a declaration in ejectment was framed, entitled as of *April* term 1796; it was served by a private hand (not the sheriff) on the defendant, in *Philadelphia*, on the 10th of *August* 1796; and it was entered on the docket of the Supreme Court, on *Saturday*, the 20th of *August* 1796: but the Court had risen (contrary to the usual practice, and the expectation of the bar) on the preceding day, when, of course, the term ended.

In *April* 1797, a rule was obtained, by the defendant, to show cause, why the ejectment should not be struck off the docket; on the ground, that it was not *entered*, within the six months allowed by the act of assembly. And, upon the argument, in chief, at the present term, it was contended, that the cause was not in the possession of the Court, until the process was returned. 6 *T. Rep.* 617.; that, in the case of the sheriff, the Court might have called for a return, but not in the case of a special agent, employed by the plaintiff to execute a writ; 4 *T. Rep.* 119.; and that a service of the declaration in ejectment upon the defendant, is not an *entry* of the suit, within the terms, or meaning, of the law.

The plaintiff's counsel, urged the injustice, that would be done, by a mere matter of accident and surprise, if the rising of the Court, a day earlier than the usage, should be the ground of quashing the present suit. They further insisted, that the service

vice of the declaration in ejectment upon the defendant, was a commencement of the suit within six months, according to the spirit and intention of the law; that the declaration was the only process in ejectment; 2 *Sell. Pr.* 164. that it might be served on the tenant *himself*, in any place; though if the service was on a wife, or servant, it must be on the premises; 2 *Cromp. Pr.* 165. *Runn. Eject.* 155. that the sheriffs of the several counties were now obliged, by law, to serve declarations in ejectment; 3 *State Laws*, 170. *s.* 10. *Dall. Edit.* that the return is the certificate of the sheriff, stating what has been done touching the execution of the writ; *Compl. Sheriff*, 144. *Dall.* 162. and that the proceedings of a special bailiff, being recognised by law, as a competent person to serve the process in ejectment, must be as effectual as the proceedings of the sheriff. 1798.

After consideration, the COURT were of opinion, that the ejectment was well brought, within the six months allowed by the act of assembly: and ordered that the rule to show cause be discharged.

Rule discharged.

Keppele *et al. versus* Carr *et al.*
Carr *et al. versus* Keppele *et al.*

THE case was, briefly, this: *Kepple* and *Zantzinger*, *Philadelphia* merchants, being indebted to *Carr* and Sons, *English* merchants, for goods sold and delivered, bought a bill of exchange from *John Swanwick* for the amount, drawn in their favour and indorsed by them; delivered the bill to one of the partners of *Carr* and Sons, who was in *Philadelphia*, but who expressly refused to remit it, on the account and risque of his house; and informed *Carr* and Sons by letters, dated, respectively, the 20th of *May*, and 20th of *June* 1796, "that the "bill, *when paid*, will be in full for merchandize (high charged) "to our *G. Keppele*, by your invoice dated the 31st of *March* 1795." The bill was duly presented and protested for non-acceptance, on the 27th of *June*, and for non-payment, on the 29th of *August* 1796; and, on its being returned with the protest, notice was regularly given to the drawer and indorsers. *Keppele* and *Zantzinger* then (about the 5th of *November* 1796) tendered to *Carr* the principal and interest of the bill, and demanded restitution of it, with the protest; but *Carr* refused to accept the tender, or to deliver up the bill; saying "that he would settle the bill him-"self with *Swanwick*:" whereupon *Zantzinger* declared, "We "shall consider the bill at your risque, from this day." *Carr* then entered into an arrangement with *Swanwick*, took his promissory note for principal, damages, and charges, and delivered to him the bill and protest. Before the note became due,

Swanwick

1798. *Swanwick* had failed; and *Carr* demanded payment from *Keppele* and *Zantzinger*, on the footing of the original account for goods sold. On the other hand, *Keppele* and *Zantzinger* demanded from *Carr*, the twenty per cent. damages, included in *Swanwick's* note, with interest from the date of the note. And, upon these adverse claims, the present actions were instituted, and tried at the same time.

At the trial of the cause, three grounds were taken in favour of *Carr* and Sons: 1st. That the language of the letters, written by *Keppele* and *Zantzinger*, was not meant to retain an interest in the bill of exchange; but to preserve, unimpaired, the original contract, if the bill was not honoured; or, at most, to protect them, as indorsers, from being liable for damages; but not to entitle them to receive any. *Carr* and Sons had a complete power over the bill; they might have cancelled it after acceptance, for the acceptor's note; or they might have released it upon any, or no consideration to the drawer's agent in *England*; the only effect of which would be, to render the bill payment of the preceding debt, as in *Watts* v. *Willing*, 2 *Dall. Rep.* 100. And *Chapman* v. *Steinmetz*, 1 *Dall. Rep.* 261. differs from this case; because the suit was there against the drawer of the bill, who was, also, the original debtor, expressly stipulating, that he should not be liable for damages; and here *Carr* and Sons do not sue *Keppele* and *Zantzinger* on the bill, for damages. 2d. That whatever might be the operation of the original contract, the claim of *Keppele* and *Zantzinger* to damages was extinguished, when *Zantzinger* declared, that "the bill would be considered "for the future, at the risque of *Carr* and Sons;" changing essentially the relative responsibility of the parties. 3d. That the suit brought by *Keppele* and *Zantzinger*, for the damages, was a disaffirmance of any implied contract, that the bill of exchange was paid, or received, in satisfaction of the precedent debt; and, consequently, *Carr* and Sons are entitled to recover upon the old account, whatever may be their responsibility for the principal, as well as the damages, of the bill. In that respect, too, *Keppele* and *Zantzinger* have chosen to regard them as agents; and can only be entitled to recover, what *Carr* and Sons received, to wit, *Swanwick's* promissory note.

In favour of *Keppele* and *Zantzinger*, it was urged, 1st. That the remittance of the bill of exchange was, by express stipulation, upon their account, and at their risque; and the terms of the remittance came, pointedly, within the principle of *Watts* v. *Willing*, and *Chapman* v. *Steinmetz*. Till the bill was paid in *England*; or, in case of a protest, till it was recovered from the drawer here, it was, exclusively, at the risque of *Keppele* and *Zantzinger*; and they, who were exposed to the whole risque were entitled, in law and equity, to the whole benefit of an indemnity. 2d. That

2d. That the declaration of *Zantzinger*, does not, either in the intention, or the expression, amount to a waiver of the claim for damages; nor can it, in any respect, impair, or alter, the conditional contract on which the remittance was made. 3d. That the conduct of *Carr* and Sons has made the bill of exchange an absolute fund for the payment of the precedent debt; and that debt was eventually extinguished and satisfied, by taking *Swanwick's* note: but their conduct creates no right to receive, more than the amount of the precedent debt; and, consequently, they are liable for the damages in one suit, though they cannot recover upon the account, in the other suit. 1798.

(1) SHIPPEN, *Justice.* The sum in controversy is small; but the principle of the decision, is of great and general importance. What is the law, the justice, and the usage, upon the subject? It appears from two cases, that have been cited (1 *Dall. Rep.* 261. 2 *Dall. Rep.* 100.) to be the settled law, that where a bill of exchange is not paid and received, in satisfaction of a debt, due from a merchant to his correspondent, it goes at the risque of the debtor; and the creditor who remits it for acceptance and payment, stands on the footing of an agent only, until the bill is actually paid. Then, in point of justice, it seems but fair, to allow every incidental, or casual, profit and emolument, to the party who is exposed to all the hazard and inconvenience of the remittance. As to the usage, the jury are best able to ascertain it from personal experience; but so far as I have been able to collect information, there appears to be only one opinion among commercial men; to wit, that he is entitled to the damages, on whose account and risque the bill of exchange is remitted. To disturb this usage, would, obviously, operate very injuriously to the *American* merchant, in favour of foreign merchants; but, if the usage were not established, or if it were an unreasonable one, our decision would not depend upon considerations of that nature: we should say, *fiat justitia, ruat cælum!*

Let us, then, consider the facts of the present case, under this general view of the law, justice, and usage, of merchants. The debt was due and payable in *London.* The creditor refused to accept payment here, on account of the rate of exchange. The immediate loss and expense of the remittance fell, therefore, on the debtor, as well as the contingent risque of the bill. The creditor, also, refused to take the hazard of the remittance to himself; and, in effect, agreed to act as the agent of the debtor, in all that related to the bill of exchange. There is not, in short, the least doubt on this important fact, that the bill was remitted on account of *Keppele* and *Zantzinger*, though indorsed by them

(1) The Judges differing in opinion, each addressed the jury; but the *Chief Justice*, on account of indisposition, added only a few words, in affirmance of the sentiments of SHIPPEN, *Justice.*

to

1798. to *Carr* and Sons. When the bill returned protested, the debtor demanded it, tendering the amount of principal and interest; but this overture to a payment was peremptorily rejected by *Carr*; and he assumed the sole management of settling the business with *Swanwick*. Whether it was settled by a cash payment, or by a promissory note, is not material; the bill being delivered up without the authority, or consent, of *Keppele* and *Zantzinger*; and *Carr* and Sons becoming, consequently, responsible to them, for the full value of their interest in the bill. That interest was the amount of the damages, on the principles, which have already been suggested; particularly, because *Keppele* and *Zantzinger* defrayed the whole expense, and run the whole risque, of the remittance. Suppose, produce had been shipped to *Carr* and Sons, to be sold on account of the shippers, but the proceeds were to be applied to the payment of their debt, could it be pretended, that the consignees would be entitled to any profit on the sale; or that, in case of a loss, it must be borne by them? No: in that instance, and I think, with a parity of reason, in the instance before the Court, *Carr* and Sons are neither to know profit nor loss, in the transaction. It is surely enough for the *British* merchant, to enjoy the fair profit charged upon the goods, which he sells and transmits to his *American* customers; without being allowed to speculate upon the damages on bills of exchange, the usual medium for paying his account, in a way, that enables him to pocket all the gain, and to cast upon them all the loss.

In justice to *Carr* and Sons, however, it is proper to take notice of another ground, on which their cause has been placed; the only ground, indeed, that has created any doubt, or difference, in the minds of the Judges. On the 5th of *November* 1796, when they refused to accept a tender of principal and interest, *Keppele* and *Zantzinger* made a declaration, which, at the first view, looked as if they relinquished every pretension to the bill of exchange: "We shall consider the bill as at your risque from this day." This expression, however, cannot, in law, be regarded as constituting a new contract, or agreement; for, certainly there was no mutuality of bargain; no coincidence of proposition and assent: But it may, in point of fact, be regarded as an extinguishment of the conditional terms of the remittance; as an abandonment of all claim upon the bill of exchange; a fact which the jury must decide. It appears to me, however, that if law, justice, and usage, had previously vested the right to damages in *Keppele* and *Zantzinger*, it is too light, too equivocal, an expression, to be construed into a waiver of that right; particularly, when it may with, at least, equal propriety be construed to mean, that they should consider *Carr* and Sons responsible, if *Swanwick* failed in payment.

On the action by *Carr* and Sons, against *Keppele* and *Zantzinger*, it is unnecessary to detain the jury with any explanatory remarks.

remarks. The account was settled; and, by the conduct of the plaintiffs, it has been completely paid, in law and justice. 1798.

SMITH, *Justice*. I concur in the opinion of my venerable brother, as to the second action; and subscribe, indeed, to all the general principles, which he has stated, in reference to the first. But it is my misfortune to view in a different manner from him, the important transaction of the 5th of *November* 1796: for, whatever may have been the antecedent rights of *Keppele* and *Zantzinger*, the conversation of that day, does, in my opinion, essentially change the situation of the parties. The bill was thenceforth entirely at the risque of *Carr* and Sons; and if *Swanwick* had failed the very next day, before any arrangement for payment, or before any *laches* in the endeavour to obtain payment, *Carr* and Sons could never have recovered from *Keppele* and *Zantzinger*, either on the original account, or on the indorsement of the bill. The risque of *Keppele* and *Zantzinger* being thus at end, all their legal and equitable claim to the damages, on account of risque, must, also, be extinct.

In an early stage of the transaction, too, I think there is some fallacy in treating *Carr* and Sons merely as the agents of their debtor, in relation to the bill of exchange. If they had lost, or destroyed, it; if, on the protest, the drawer's friend had paid it in *London* for his honour; or, if *Carr* and Sons, after an acceptance, had released the acceptor, with, or without, a consideration; surely, in none of these instances could a claim to twenty per cent. damages arise; and all that *Keppele* and *Zantzinger* could insist upon in law, justice, or usage, would be, that the bill, under such circumstances, should be deemed a payment of their debt, notwithstanding the conditional terms of the remittance.

In these sentiments, I am uninfluenced by any consideration of attachment to the *American* merchant, or of enmity to the *British* merchant: and, I think, they will be found to conform best to the honour of all merchants, which, like the chastity of a female, should be free from suspicion, as well as free from taint.

M'KEAN, *Chief Justice*. Upon the refusal of the tender in *November* 1796, *Zantzinger* declared, that the bill of exchange should be at the risque of *Carr* and Sons for the future. The meaning of this declaration, I understand to be (at least, it is a reasonable interpretation) that *Carr* and Sons themselves should be answerable to *Keppele* and *Zantzinger*, for the principal, interest, and damages, even if *Swanwick* should become insolvent. Under the view of the case, I concur with my brother SHIPPEN, in all his remarks which he has delivered to the jury.

Verdict for *Keppele* and *Zantzinger* in both actions.

Ingersoll and *Brinton*, for *Keppele* and *Zantzinger*.
Dallas, for *Carr* and Sons.

SUPREME COURT

OF

PENNSYLVANIA.

March Term 1799.

M'Clay *versus* Hanna *et al.*

THIS was an appeal from the Orphan's Court of *Dauphin* county, under the following circumstances: *John Harris*, by his will dated the 25th of *May* 1790, proved 2d of *August* 1791, bequeathed all his personal estate to his sons *David*, *Robert*, and *James*, and his daughters *Mary M'Clay* and *Mary Hanna*, to be equally divided between them. He, also, ordered his executors to sell all his lands not otherwise disposed of by his will, and divide the proceeds as aforesaid. He directed his executors to settle their accounts, in the Orphan's Court, in one year after his decease, and continue to settle an account annually until the estate was finally settled.

In *January* 1795, a citation was issued at the request of *William M'Clay*, one of the executors of *John Harris*, against *David Harris*, *Robert Harris*, *John Andrew Hanna*, *Joseph Work*, and *John M'Clay*, the other executors, to appear at the next Orphan's Court for *Dauphin* county, to make a full disclosure of all effects and estate of the deceased, which have come to their hands, possession, or knowledge, and settle and abide the order and judgment of the Court on the premises. The cause came to a hearing in the Orphan's Court, in *September* 1795; when a motion was made by *M'Clay's* counsel that *Robert Harris* and *John A. Hanna* should answer, on oath, to a charge of having received money for the sale of sundry lots, which had been conveyed to them by the testator, by absolute deed, on a secret trust, to be accountable for the proceeds of the sales: and that they should bring the said proceeds into their administration account, and charge themselves therewith. The Court determined, 1st. That the said *Harris* and *Hanna*, should not be obliged to answer on their oath to the said charge: and, 2d. That the plaintiff should

should not be allowed to produce evidence, to substantiate the truth of his charge against the said *John A. Hanna*; but that the account of the said *Harris* and *Hanna*, as then exhibited to the Court, should be received and passed. The plaintiff appealed from this judgment; and the cause comes upon the appeal. 1799.

After argument by *W. Tilghman* and *Dallas*, for the appellant; and by *Ingersoll*, for the appellees, the COURT dismissed the appeal, because it did not appear, that the Orphan's Court had pronounced a definitive decree.

Ewalt's Lessee *versus* Highlands. (1)

EJECTMENT for 400 acres of land at *Gerty's Run*, across the *Alleghany*, the plaintiff claiming under settlement and survey. From the evidence it appeared, that, on the 30th of *April* 1792, the lessor of the plaintiff passed the *Alleghany*, with two hands, to make an improvement; that they deadened about one acre of wood, returned, and, about two weeks afterwards, went over again, and deadened a little more wood; that a cabin was erected, with a clap-board roof, eight feet square, and logs cut out for a door; that a few peach stones, apple seeds, and potatoes were planted; but no other improvements were made; and neither the lessor of the plaintiff, nor any tenant for him, resided on the land. On the 9th of *April* 1794, a survey was made by *Jonathan Leet*, the deputy surveyor of the district, under this settlement. On the 10th of *February* 1796, *Ewalt* leased the land to *P. Smith*, who went over the *Alleghany*, kindled a fire in the cabin, staid there an hour, and then removed; but *Ewalt*, and his family, constantly resided on the east side of the river; while, on the other hand, the defendant and his family lived for three years on the premises.

1st. When *Leet's* survey was offered in evidence, the defendant's counsel objected; but it was admitted by the COURT, upon the ground, "that in cases of title, under settlement and improvement of lands, north and west of the rivers *Ohio* and *Alleghany* and *Conewango* creek, the deputy surveyor must, in the first instance, judge of the right; though subject to the opinion of the Court and jury."

2d. In delivering the charge, the following sentiments were expressed,

By the COURT: It is now the province, and the duty, of the Court and jury, to decide, whether the survey in question, was properly made, under the act of the 3d of *April* 1792. (3 *State Laws*, *Dall. edit.*) The act itself has laid down no general rule,

(1) Tried at *Pittsburgh*, *May* 1799, before YEATES and SMITH, *Justices*.

1799. ascertaining what kind and extent of settlement and improvement will warrant a survey; nor is it the intention of the Court, upon the present occasion, to lay down any general rule upon the subject. It may, however, be observed, that personal residence, must accompany any settlement, on which a survey can be regularly made; unless such danger exists, as would prevent a man of reasonable firmness, from remaining on the land; and even then, the *animus residendi* must appear. Again: though we agree, that what constitutes a settlement, will essentially depend on the circumstances of each case; we may state, negatively, that deadening an acre, or two, of timber, planting a few peach stones, a few apple seeds, or a few grains of corn, can never be deemed circumstances, amounting, in themselves, to a settlement in any case, though a cabin should, also, be put up, if the party resides at a distance, and no tenant actually occupies the land. If these can give no legal preference, much less will it be deemed a case of preference, contemplated by the act of assembly, that a man has set his foot, or his *heart*, on a tract, and claims it as his own. It is hardly necessary to add, that we do not think the acts of the lessor of the plaintiff, in the present case, constituted such an actual settlement, as authorised a survey; and, consequently, he has no title to recover the land.

The plaintiff's counsel, finding the opinion of the Court thus decidedly against him, suffered a nonsuit.

Brackenridge, for the plaintiff.
Woods and *Collins*, for the defendant.

SUPREME COURT

OF

PENNSYLVANIA.

September Term 1799.

Ball *versus* Dennison.

THIS was an action brought by the indorsee, against the indorser, of a promissory note for 5000 dollars, drawn by *Samuel Emory*, on the 26th of *December* 1795, and payable 65 days after sight. The drawer, failing to pay the note, it was regularly protested, on the 3d of *March* 1796; and the only question agitated upon the trial, was, whether reasonable notice of the non-payment was given to the indorser, or due diligence employed to give it?

The material facts were these: *Emory* and *Dennison* had purchased from the managers of the *Schuylkill* canal lottery a number of tickets, for which a note was given to the president, the plaintiff in this action. The purchasers settled their accounts of the speculation, before the note became due, in consequence of which *Emory* was bound to pay the note; but when it became due, *Dennison* agreed to continue his indorsement for the accommodation of *Emory*, though the joint interest had ceased; and the plaintiff, by way of renewal, at the instance of *Emory*, took the note, on which the present action was instituted. *Dennison* was not a permanent inhabitant of *Philadelphia*; but was domiciled at *Havre de Grace*, in *Maryland*. He had, however, an agent in *Philadelphia*, to whom the banks, in consequence of written instructions, delivered the notices of his paper engagements payable there, on which he was drawer (not indorser) during the years 1795, and 1796; and who constantly, for that period, made the necessary payments; nor would he have hesitated (he declared) to pay the present note, if he had been informed of the default of the drawer. It appeared, likewise, that *Dennison* was, occasionally, in the city of *Philadelphia*, in the months of *February*, *March*, *April*, *May*, *June*, *August*, and *September* 1796; and, in

1799. in the month of *May*, *Emmory* informed him of the protest; but, at the same time, declared that he had made preparation to discharge the note. On the other hand, it was proved, that after the default of the drawer, particular and repeated inquiry was made for the indorser by the notary, as well from *Emmory* as others; that the indorser was not then in *Philadelphia*, and the notary did not himself know that he had an agent here, for such purposes, though he knew there were transactions of business between him and the person, who is said to have been his agent; that the notary heard *Dennison* lived at *Havre de Grace*, but, at the same time, was told, he had gone to the eastward; that as soon as the plaintiff understood that *Dennison* was in the city (about six weeks, or two months, after the protest) the plaintiff's clerk called on *Dennison*, mentioned the facts, and demanded payment; when *Dennison* said, that he had received no part of the proceeds of the lottery tickets; but that he would urge *Emmory* to discharge the note.

The defendant's counsel contended, on these facts, that there was not reasonable notice of the protest of the note, nor due diligence to give it: that, under the circumstances of the case, the defendant was not under a moral obligation to pay the note, and might fairly take advantage of the strict rule of law, according to 1 *Dall. Rep.* 234. 252. 270. 2 *Dall. Rep.* 158. 192.: that no notice was given to the indorser till *May* 1796, though he was occasionally here, before that time, and subsequent to the protest; though he had an agent here; and though he lived in a neighbouring state, to which the post would have carried notice, in the course of a few days: and that actual knowledge of non-payment, is not sufficient to charge an indorser, unless the information is received promptly from the holder, with notice that he looked to the indorser for payment: *Kyd on Bills.* 79. 1 *T. Rep.* 167. 5 *Burr.* 2670. 1 *T. Rep.* 712.

The plaintiff's counsel insisted, that as the private arrangement between *Dennison* and *Emmory*, was unknown to the plaintiff, his claim upon the defendant in morality, as well as law, could not be impaired by it; that the law was not controverted, on the authority of the cases cited; but still it left the matter of fact to be ascertained, what was reasonable notice of protest, under all the circumstances of the case? that the first important feature of the case, exhibits the defendant as a non-resident of *Philadelphia*, a mere transient visitor: that notice sent south to *Havre de Grace*, when it was known he had gone north, would have been useless and idle: that the notary did not know, and the evidence is, otherwise, uncertain in the instance of the defendant's being an indorser, that he had any agent in *Philadelphia*: and that due and diligent inquiry was made for the indorser in *Philadelphia*, where the consideration arose, and the note was given.

As

As to the cases cited, for the defendant, they are susceptible of answers, easily distinguishing them from the present case. Thus: In 1 *Dall. Rep.* 234. 270. the bill was kept two years and a half; the indorser lived in *Poughkeepsie*, only 130 miles distant; he was a man of note, in extensive business, and actually had some transactions with another of the indorsers. In 1 *Dall. Rep.* 252. the note was protested for non-payment on the 12th of *June* 1786; on the 5th of *July* and 23d of *August*, the plaintiff received partial payments from the drawer; and it was not till after the last date, when the drawer had become embarrassed, that notice was given to the indorser; who, during the whole time, lived and kept a counting house in *Philadelphia*. In 2 *Dall. Rep.* 158, both parties lived in *Philadelphia*; and the jury thought three or four days was not too late to give notice. In 2 *Dall. Rep.* 192. the bill of exchange was drawn in *September* 1781, presented and refused acceptance in *November* 1781, and protested for non-payment in *August* 1782; but no notice was given to the indorser till the beginning of the year 1790. When the bill was presented, the drawee had funds of the drawer in his hands; but he had paid the amount to the drawer's agent, who died, and whose wife had lost the money. 1799.

SHIPPEN, *Justice.* (1) The cause depends upon one point, which is a matter of fact. The general law is, that when a promissory note is dishonoured by the drawer, the indorser becomes immediately liable; and the holder is entitled to recover the amount from him, unless he is discharged by the act of the holder, either in giving further time, or credit, to the drawer; or in neglecting to give the indorser due notice of the non-payment. This notice is indispensable: so much so, that it is immaterial, whether the drawer becomes insolvent before the notice, or not. Still, however, what constitutes due notice, is a point to be settled. In *England* (where it is regarded as a question of law) the rule is strict and positive, that the notice must be given on the next day, if the parties live in the same place; and by the next post, if they live in different places. But in *Pennsylvania*, it has hitherto been regarded as a matter of fact, to be decided by a jury, under all the circumstances of each case, as it arises. In deciding it, however, the jury will always be governed by a sound and reasonable discretion. They will allow but a short time for giving notice, where the parties reside in the same town; for, six weeks in such a case would certainly be too long; and, for giving notice in different parts of the country, they will bring into the calculation of a reasonable time, the facility of the post, the state of the roads, and the dispersion of the inhabitants, in relation to the post towns.

(1) SHIPPEN, and SMITH, *Justices*, were the only judges on the bench, at the trial of this cause.

With

1799. With these prefatory remarks, let us review the circumstances of the present case. The note was duly protested for non-payment. The notary, at the same time, made diligent inquiry after the indorser; particularly from the drawer, who was most likely to possess the necessary information. He heard that the indorser lived at *Havre de Grace*, but was then gone to the eastward. Proof has, also, been given of *Dennison's* repeatedly visiting *Philadelphia*, after the protest; but it is not proved, that the plaintiff was acquainted with the fact; and, without that proof, he cannot be legally charged with *laches*. It is proved, that *J. B. Bond* was *Dennison's* general agent in *Philadelphia*; but it is not proved, that he was a public, known, agent; nor (which is again essential to affect the plaintiff's claim) that the plaintiff was apprised of the agency. As to the fact, that *Dennison* lived at *Havre de Grace*; and as to the argument, that notice ought to be given wherever the indorser lives; it is important to remember, that the commencement of the transaction was in *Philadelphia*; that the note was dated there; and that all the parties contemplated *Philadelphia* as the place of payment. Besides, it would interrupt the negotiability of notes, and greatly embarrass the general operations of commercial credit, if an indorser was entitled to notice, on the strict terms suggested, though he lived in the *East*, or the *West*, *Indies*; or though he was a mere itinerant, constantly shifting the place of his abode, and the scene of his business. It is, therefore, an object of leading influence, in the decision of this cause, to consider, whether, under all the circumstances in proof, the plaintiff was bound to inquire for the defendant, beyond the city of *Philadelphia*? The case of *Steinmetz* v. *Curry*, 1 *Dall. Rep.* 234. 270. ought not to be a guide on the occasion; for, there, the bill was kept by the holder two years and a half, without giving notice to an indorser, who was known to reside constantly at *Poughkeepsie*, in *New-York*. But, upon the whole, it appears to the Court, that the plaintiff did make a prompt inquiry for the indorser in the city of *Philadelphia*; and that the defendant has not sufficiently established those facts, which would have made it incumbent upon him, either to send notice to *Havre de Grace*; or to serve notice upon the agent in *Philadelphia*. If the jury concur in the opinion, they will find for the plaintiff; but if they do not, it is their right, and their duty, to find for the defendant.

Verdict (delivered without the jury's retiring from the bar) for the plaintiff, 6051$\frac{13}{100}$ dollars, and six cents costs.

SUPREME COURT

OF

PENNSYLVANIA.

December Term 1799.

Levy *versus* Wallis.

IN this case a testatum *fi. fa.* issued on the 27th of *December* 1798, returnable to *March* term 1799, which was levied on twelve horses. A *venditioni exponas* issued to *September* term 1799; and an *alias vend. exp.* issued to *December* term 1799. On the last writ, the sheriff returned, that he had sold the horses to the amount of 1021 dollars; that *Thomas Hamilton* had bought seven of the horses for 630 dollars; but that, both before and after the sale, he had given written notice, that he claimed the money arising on the sales, by virtue of a levy previously made for him upon an execution, by the former sheriff; and that, therefore, he claimed to retain the amount of his purchases, in part satisfaction of his execution: and the remaining money of the sales aforesaid, the said sheriff has ready, &c.

From the records, it appeared, that *Hamilton* had issued a *fi. fa.* against *Wallis* on the 25th of *January*, returnable to *March* term 1798, which was levied (*inter alia*) upon seven horses; and that on the 11th of *December* 1798, a *vend. exp.* issued, but was never prosecuted.

It, also, appeared, that in the case of *Perit*, executor, v. *Wallis*, a *testatum fi. fa.* had issued to *March* term 1797, which was levied (*inter alia*) upon seven horses; that a *vend. exp.* issued; that an *alias vend. exp.* issued to *September* term 1798, on which the sales were put off at the risque of the plaintiff; and that a *pluries vend. exp.* issued to *September* term 1799.

The general question was, whether the prior execution creditors, *Hamilton* and *Perit*, had not lost their liens, by allowing the property levied upon, to remain in the hands of the defendant?

The COURT declared, that it had been repeatedly determined, and was become the settled law of *Pennsylvania*, that the act of suffering

1799. suffering goods to remain in the hands of the defendant, after they were levied upon, furnished no presumption of fraud here, as it did in *England*; and that this departure from the *English* rule arose from sentiments of humanity, and the peculiar necessities of the country. In the interior of the state, particularly, it was the universal practice not to remove the goods after a levy. If, however, the intention of leaving them with the defendant was *fraudulent*, a subsequent execution would be preferred, in *Pennsylvania*, as well as in *England*. In the present instance, there is no proof of fraud; the first levies are, of course, good; and the sheriff must pay the money arising from the sales accordingly. (1)

Pemberton's Lessee *versus* Hicks.

THIS cause (which was argued in *December* term 1798, 3 *Dall. Rep.* 479.) was kept under advisement till the 23d of *December* 1799, when SHIPPEN, *Chief Justice*, and YEATES, *Justice*, were of opinion with the plaintiff, and SMITH, *Justice*, was of opinion with the defendant.

Judgment for the plaintiff. (1)

Kesselman's Lessee *versus* Old.

BY the statute of 4 *Anne*, *c.* 16. *s.* 21. it is enacted, that "all "collateral warranties, which shall be made after the first "day of *Trinity* term, of any lands, tenements, or hereditaments, "by any ancestor, who has no estate of inheritance in possession "in the same, shall be void against his heir."

In the present ejectment, the point was, whether the plaintiff was estopped by a collateral warranty of his ancestor, who had no estate of inheritance, in possession, of the premises?

After argument, and taking time to deliberate, the opinion of the COURT was delivered by SHIPPEN, *Chief Justice*, that there was no trace of the extension of the statute of the 4 *Anne*, *c.* 16. to *Pennsylvania*, by legislative authority, or judicial practice: and,

(1) In *Chancellor* v. *Philips et al. September* term 1800, and several other cases, the law has been stated in a similar manner. But in the case of the *United States* v. *Cunningham*, in the Circuit Court, before *Judges* TILGHMAN, BASSET, and GRIFFITH, the same subject was fully discussed; and the Court adhered to the common law rule, notwithstanding the decisions in *Pennsylvania*.

(2) M'KEAN, *C. J.*, presided at the argument of the cause; but, being elected governor of the commonwealth, in *October* 1799, he took no part in the decision. He informed the Reporter, however, that his opinion was decidedly in favour of the defendant.

consequently,

consequently, that the collateral warranty of the ancestor, operated as an estoppel to his heir, the plaintiff. 1799.

Judgment for the defendant.

Reed *versus* Ingraham.

ON a motion for a new trial, this cause came again before the Court (3 *Dall. Rep.* 505.) but, after argument, the JUDGES cited 4 *T. Rep.* 2 *Bl.* 1269.; and declared, that they were confirmed, upon mature deliberation, in the opinion, which had been given in charge to the jury, that the action was well brought in the name of the assignee of the stock contract, promising to receive a transfer from "*J. B. or order.*"

Judgment for the plaintiff.

SUPREME COURT

OF

PENNSYLVANIA.

March Term 1800.

The Commonwealth *versus* Tench Coxe, Esq.

IN *September* term last, a rule was obtained, on behalf of a number of persons, who had associated under the denomination of "The *Holland* Company," for the purchase and settlement of lands, lying in the county of *Alleghany*, north and west of the rivers *Ohio* and *Alleghany*, and west of *Conewango* creek, by which the secretary of the land office was directed to show cause, why a *mandamus* should not be awarded, commanding him to prepare and deliver patents to the company, for various tracts of land, for which warrants had previously issued in their favour, under the act of the general assembly, passed the 3d of *April* 1792. The attorney-general (*M'Kean*) *M. Levy*, *W. Tilghman*, and *Cooper*, now showed cause for discharging the rule; and *Lewis*, *E. Tilghman*, *Ingersoll*, and *Dallas* argued for making it absolute. In order, however, to introduce, with perspicuity and advantage, a discussion of the important question involved in this case, it is necessary to give a general view of the facts and circumstances, which produced the controversy.

By the charter granted to *William Penn*, on the 14th of *March* 1681, (1) he became the proprietor of the soil embraced within the boundaries of *Pennsylvania*. The charter title, however, was fortified, as well since, as before the revolution, by successive purchases from the *Indians*; whose claim may be considered as fairly and finally extinguished, throughout the territory of the state, by the treaty of fort *Stanwix*, on the 23d of *October* 1784; and the treaty of fort *M'Intosh*, on the 21st of *January* 1785. (2) Inde-

(1) See 1 *vol. State Laws, in Appendix, p.* 1. *Dall. edit.*

(2) For a *reference* to the purchases from the *Indians*, and to the laws respecting lands and the land office, see 1 *vol. p.* 5. 39. 248. 503. 891. 908. 2 *vol.* 21. 201. (*c*) 3 *vol.* 209. and, generally, the proper titles to the index in *Dallas's edition.*

pendent,

pendent, too, of the charter, the boundaries of the state have been defined and enlarged, by judicial decisions, by compact, and by purchase. A controversy on the subject early arose between the proprietaries of *Pennsylvania* and *Maryland*; which was finally adjusted in the year 1750, by a decree in the Chancery of *England*, enforcing the specific performance of an agreement, which the parties had entered into in the year 1732. (3) The visionary and extravagant pretensions of *Connecticut*, extending to lands westward, as far as the *South Sea*, began to annoy the peace of *Pennsylvania* so early as the year 1753; (4) and although the rights of sovereignty and jurisdiction, after much irritation, and conflict, were at last, in the year 1782, authoritatively decided to belong to the latter state, the intruders under the spurious title of *Connecticut*, continue to assert a private right of soil, over a considerable tract of *Pennsylvania*. (5) The western line of the charter boundary, corresponding with the meanders of the river *Delaware*, remained undefined by actual survey; and it was, for a while, difficult to ascertain the limits between the jurisdiction of *Pennsylvania* and *Virginia*; but the two states, actuated by a just and friendly spirit of compromise, appointed commissioners to run a line of separation; and their report upon the subject was adopted and established in the year 1784. (6) On similar principles, the jurisdiction and property of the islands in the river *Delaware* had been settled between *Pennsylvania* and *New-Jersey* in the year 1783. (7) And in the year 1792 the state completed the present range of her territory, by obtaining a formal grant from the *United States* of a triangular tract of land, bounded by lake *Erie*: which tract had been ceded and relinquished by resolutions of congress of the 6th of *June*, and 4th of *September* 1788; and the *Indian* title was purchased, and extinguished by commissioners, appointed by the state, in *January* 1789. 1800.

The settlement and cultivation of *Pennsylvania*, have, at all times, been the favourite objects of her government. The proprietaries, while the soil and jurisdiction were vested in them, resisted every attempt of individuals to purchase lands from the *Indians*: but permitted a free access to the land office, or board of commissioners, which they instituted, either for the purpose of obtaining original grants, or for the purpose of completing equi-

(3) See *Proud's History of Pennsylvania*, 1 *vol.* 187. *Cases in Chancery temp. Ld. Hardwicke*, 332. *Penn* v. *Baltimore*, 1 *Ves.* 444. *S. C.*

(4) For a history of the rise and progress of the claim, see a pamphlet published in the year 1774, by Dr. *William Smith*, the late provost of the college of *Philadelphia*.

(5) For the proceedings, which terminated in the decree of *Trenton*, see the *Journals of Congress*, for the year 1781, 7 *vol. p.* 169. 171, &c.

(6) See 2 *vol. p.* 207.

(7) See 2 *vol. p.* 143.

table

1800. table titles, within the territory over which they had themselves extinguished the *Indian* claim. The ownership of the unappropriated soil, naturally passed with the political sovereignty, from the proprietaries to the commonwealth, upon the principles of the revolution; and accordingly the legislature, on the 27th of *November* 1779, assumed the general territorial rights of the proprietaries; but, at the same time, confirmed to them all their private estates, and such proprietary tenths or manors, with the rents reserved on them, as had been surveyed and returned into the land office, before the 4th of *July* 1776: granting also a sum of 130,000*l.* sterling to the *Penn* family, as a mark of gratitude for the services of the founder of *Pennsylvania*. (8). This change in the ownership of the soil, rendered in necessary to provide, under the authority of the state, for pre-existing claims to particular tracts of land, taken up and located under the proprietary grants, warrants, and other office rights. With that view, exclusively, a land office was opened in the year 1781; (9) and in the ensuing year a board of property was instituted, with power "to hear and "determine in all cases of controversy or *caveats*, in all matters "of difficulty, or irregularity, touching escheats, warrants on es- "cheats, warrants to agree, rights of pre-emption, promises, im- "perfect titles, or otherwise, which heretofore have, or hereafter "may, arise, in transacting the business of the land office." (10) The earliest direct appropriations of any of the territory of the state for public use, subsequent to the revolution, were two provisions; the first for laying off a tract of land, to redeem the depreciation certificates, which had been issued to the officers and soldiers of the *Pennsylvania* line; and the second for laying off another tract of land, to satisfy the donation, which had been promised to the same troops, by a legislative vote of the 7th of *March* 1780; both tracts lying north and west of the rivers *Ohio* and *Alleghany*, and *Conewango* creek. (11) On the 13th of *April* 1784, however, the land office was opened, for granting and disposing of such of the unappropriated lands, as had been previously purchased from the *Indians*, at the rate of 10*l.* per hundred acres: (12) and soon afwards, it was extended to the sale of lands within the purchase then made, or about to be made, at the rate of 30*l.* per hundred acres; (13) the proceedings being regulated, so as to secure impartiality in the treatment of applicants, by an act of the 8th of *April* 1785. (14)

From this operation of the land office, thus opened, the reservations were confined, 1st, to islands within the rivers *Susquehannah*, and its branches, the *Ohio*, the *Alleghany*, and the *Dela-*

(8) See 1 *vol. p.* 822.
(9) See 1 *vol. p.* 891.
(10) See 2 *vol. p.* 21. *5th April* 1782.
(11) See 2 *vol. p.* 88. *12th March* 1783.
(12) See 2 *vol. p.* 201.
(13) See 2 *vol. p.* 234. *21st Dec.* 1784.
(14) See 2 *vol. p.* 311.

ware;

ware; 2d, to the appropriated lands north-westward of the *Ohio* and *Alleghany*; 3d. to the triangular tract on lake *Erie*, purchased from the *United States*; and, 4th, to certain bounties, or gifts, conferred on religious, or scholastic, institutions, and pre-emptive rights granted, or recognised, by law. But a great portion of the valuable land of the state being sold, an act was passed on the 3d of *April* 1792, for the sale of all the remaining vacant lands within the commonwealth. By this act the price of the vacant land within the purchase of the year 1768, and all prior purchases from the *Indians*, was reduced to 50 shillings for every hundred acres; the price of the vacant land within the limits of the purchase of the year 1784, and lying east of the river *Alleghany* and *Conewango* creek, was reduced to 5*l.* for every hundred acres; and all other lands belonging to the commonwealth, lying north and west of the rivers *Ohio* and *Alleghany*, and *Conewango* creek (not specifically appropriated) were offered for sale, "to persons "who will cultivate, improve, and settle the same, or cause the "same to be cultivated, improved, and settled," for the price of 7*l.* 10*s.* for every hundred acres, with an allowance of six *per centum* for roads. 1800.

The manner of locating, surveying, and securing, to the respective purchasers, the tracts of land, claimed, either upon warrants, upon actual settlements completed, or upon actual settlements commenced, may easily be traced in the several sections of the act: but as the present case depends particularly on a construction of the ninth section, it is proper to recite it here at large: "And be it further enacted, &c. that no warrant, or survey, to "be issued, or made, in pursuance of this act, for lands lying "north and west of the rivers *Ohio* and *Alleghany*, and *Cone-* "*wango* creek, shall vest any title in or to the lands therein men- "tioned, unless the grantee has, prior to the date of such war- "rant, made, or caused to be made, or shall, within the space of "two years next after the date of the same, make, or cause to "be made, an actual settlement thereon, by clearing, fencing, "and cultivating, at least two acres for every hundred acres con- "tained in one survey, erecting thereon a messuage for the habi- "tation of man, and residing, or causing a family to reside there- "on, for the space of five years next following his first settling "of the same, if he or she shall so long live; and that in default "of such actual settlement and residence, it shall and may be law- "ful to and for this commonwealth, to issue new warrants to other "actual settlers for the said lands, or any part thereof, reciting "the original warrants, and that actual settlements and residence "have not been made in pursuance thereof, and so as often as de- "fault shall be made, for the time and in the manner aforesaid, "which new grants shall be under and subject to all and every "the regulations contained in this act: *Provided always never-* "*theless*, That if any such actual settler, or any grantee in any

"such

1800. "such original or succeeding warrant shall, by force of arms of "the enemies of the *United States*, be prevented from making "such actual settlement, or be driven therefrom, and shall persist "in his endeavours to make such actual settlement as aforesaid, "then, in either case, he and his heirs shall be entitled to have "and to hold the said lands, in the same manner as if the "actual settlement had been made and continued." 3 *vol.* 212. *Dall. edit.*

As the dispensation contained in the proviso, was to operate only in the case of an existing warfare, it was stated, in the discussion of the present case, that, in fact, hostilities between the *United States*, and the *Indians*, were never so entirely discontinued, from the period of the revolutionary contest, until general *Wayne's* treaty in the year 1795, as to render it practicable, with safety, to make actual settlements upon the lands in question. The position was shown historically, from the military operations of the federal and state governments; judicially, from the opinions of the Courts of justice; and experimentally from the evidence of disinterested individuals. Thus,

After the *European* peace of 1783, an army was always maintained on the western frontier. During several years, general *Harmer* was employed in making hostile incursions into the *Indian* country; and, in the year 1790, he was defeated. The progress of general *St. Clair* terminated, also, in defeat, on the 4th of *November* 1791, only five months previously to the date of the law. General *Wayne* succeeded to the command, prosecuted the war with vigor, and completely routed the enemy in the year 1794. This victory produced a treaty, which was signed on the 3d of *August* 1795, and was ratified on the 22d of *December* following. While these events occurred, the north-western frontier of *Pennsylvania* was constantly exposed to the sanguinary incursions of the *Indians*; many lives were lost; and, in the very description of the proviso to the 9th section of the act, every actual settler, or grantee, was "by force of arms of the "enemies of the *United States*, either prevented from making an "actual settlement, or driven from it." The state of *Pennsylvania*, co-operating with the federal government, before the act passed, in the very session in which it passed, and so late as *December* 1795, called out parties of the militia, raised regular troops, and established military posts: and, at one period, while negotiations for peace were carrying on, the state suspended her settlements, and plans of defence, in the country bordering on lake *Erie*, at the request of the federal government, lest the enemy might take umbrage and break off the treaty. (15) In fine, the

(15) For the various military measures pursued by the state government, and the general opinion of danger, see the following laws, and the entries in the journals of the senate: 3 *vol.* 19. 17th *March* 1791. 1 *Journal Sen.* 272, 3. 24th *August* 1791. *ibid.* 27. 29. 37. 47. 54. *December* 1791, and *January* 1792. 3 *State Laws*,

the result of these circumstances to prevent making, and continuing actual settlements, during the *Indian* war, has been repeatedly recognised in the western county Courts, and in the Courts of *Nisi Prius*, held by the Judges of the Supreme Court in *Allegheny* county, subsequent to the ratification of general *Wayne's* treaty. (16) 1800.

But the dispensation, contained in the proviso, is, likewise, qualified with a stipulation, that the actual settler, or grantee, in my warrant, "shall persist in his endeavours to make such actual "settlement" as the law describes. The perseverance of the *Holland* company, in time, in labour, and in money, was, therefore, exhibited in detail upon the present occasion. It appeared from various official documents, and depositions, that the company had purchased and paid for 1162 tracts, of 400 acres each, situated in districts No. 1, 2, 3, 6, and 7, and that for these tracts warrants of survey were issued, dated respectively, in the months of *April* 1792, and of *April* and *August* 1793. From the day of issuing the warrants until the present day, the endeavour of the company and their agents, to occupy, improve, and settle the lands, has been incessant. Thus, as soon after the dates of the warrants, as the deputy surveyors could be prevailed upon to attempt to execute the surveys, in the years 1794, and 1795, a general agent was appointed to superintend the business of the company, a large store was built at *Cassewago*, or *Meadeville*, and a sum exceeding 5000 dollars was actually disbursed. In the year 1796, companies of settlers were invited, encouraged, and engaged; ample supplies of provisions, implements, utensils, &c. were sent into the country; the expense of transporting families was liberally advanced; a bounty of one hundred acres was given for improving and settling each tract; and a further sum of about 22,000 dollars was actually disbursed.

In the year 1797 a sum of about 60,000 dollars was further expended in promoting the same objects, including payments on

Laws, 177. 20th *January* 1792. 2 *Journ. Sen.* 8th *December* 1792. 3 *State Laws*, 335. 3d *April* 1793. 2 *Journ. Sen.* 288. 29th *August* 1793. *Ib.* 294. 4th *September* 1793. *Ib.* 5th *December* 1793. 3 *State Laws*, 464. *s.* 2, 3. 28th *February* 1794. *Ib.* 483. 8th *April* 1794. 2 *Journ. Sen.* 264, 5. 2d *September* 1794. 3 *State Laws*, 737. 13th *April* 1795. *Ib.* 763. *s.* 13, 14.

(16) See *Ewalt's* Lessee v. *Highland*, *ante*, *p.* 161. *M'Laughlin's* Lessee v. *Dawson*, and *Morris's* Lessee v. *Neighman*, *post*.

Since this report was prepared, the same question has been agitated in the Circuit Court of the *United States*, in the *Lessee of Balfour* v. *Meade*, at *April* term 1803. The evidence was conclusive, that until the spring of 1796, it was not safe to prosecute settlements in the country, lying north and west of the rivers *Ohio* and *Alleghany*, and *Conewango* creek: and although the cause was decided in favour of the defendant, who claimed as an actual settler, upon other grounds, Judge *Washington*, in his charge to the jury, admitted the fact to be proved, and declared, that where the fact of prevention could avail the party, it operated during the whole war, and for a reasonable time (according to the circumstances of the case) after the treaty of peace. The case is reported in a subsequent part of the present volume.

contracts,

1800. contracts for settlement, and quieting adverse claims. In the year 1798, mills were erected, roads were opened, and other exertions were made, at a charge of not less than 30,000 dollars. In the year 1799, the sum of 40,000 dollars and upwards was expended in improvements and settlements; in the salaries and wages of agents and workmen; in opening and repairing roads; and in patenting 876 tracts of land. And in 1800 the operations and advances of the company will, at least, be equal to those of any preceding year. In short, at the close of the present year, near 400,000 dollars will be expended, according to the following view of the subject.

The amount of the purchase of the late *James Wilson*, Esq. including the purchase money paid to the state, at the period of obtaining warrants, was	222,071	10
The amount of disbursements for making improvements, settlements, &c. was	157,000	
The amount of taxes and expenditures, for the year 1800 will be	18,000	
Dollars,	397,071	10

And regarding the operations of the company, in another aspect, we find, that the gross amount of the expenditures, upon the quantity of land, which remained for them to improve and settle, will furnish an average at the rate of 230 dollars, for each and every tract. For instance:

	Tracts.	
The original number of warrants called for,	1162	
But, from this aggregate there must be deducted,		
On account of prior occupants of the land	113	
On account of tracts lost upon re-surveys in district No. 1	11	
On account of tracts lost upon re-surveys in district No. 6	3	
On account of bounties to actual settlers, who improved under the company, but at their own charge, one-fourth of 1021 tracts	259	
	386	
	776	

Then, it is seen, that the gross amount of the expenditure to the present period, of 178,000 dollars being equally apportioned to 776 tracts, furnishes, as has been stated, an average disbursement of about 230 dollars, for improving each tract; a sum which, in ordinary times, would certainly have been competent to accomplish every improvement designated in the act of the 3d of *April* 1792.

But

But leaving these details, for a moment, to contemplate the general effect of the capital, industry, and enterprise, which the *Holland* company have thus employed and displayed; and, it is found, that by a conduct the most upright and conciliatory, they have avoided, or adjusted, every conflicting claim to any part of their purchase; so that there does not now exist a single *caveat* on the files of the land office, against the issuing of any patent they demand. The benefit of their exertions has extended, too, far beyond the limits of their own property: nor are they merely their neighbours, who are accommodated and enriched; but the opulence, population, and security, of the whole range of western frontier, have been augmented beyond all calculation. Nay, the influence of the example has been diffused throughout the state, and is felt in every quarter of the union. 1800.

Considering the terms of the act of the 3d of *April* 1792, it became a question at the land office, in what manner the accomplishment of an actual settlement and residence, within the meaning of the enacting part of the 9th section, should be proved; and, also, upon what evidence, the dispensation of the proviso, was to be allowed. On the first object, the board of property, on the 16th of *December* 1797, prepared and published the form of a certificate in the terms of the law, to be signed by the deputy surveyor of the proper district, and by the district judge, or two justices of the peace, residing in the vicinity of the land: (17) and on the second object, they took the precaution of consulting the attorney-general, upon the form which they had drafted; and that gentleman, as it appears from the minutes of the board, dated the 21st *December* 1797, declared "the certificate proposed by "them, respecting the lands lying north and west of the rivers

(17) The minute of the board of property, is in these words:

At a special meeting of the Board of Property, 16*th Dec.* 1797.

Present { DANIEL BRODHEAD, S. G. / JOHN HALL, Secretary, / FRANCIS JOHNSTON, R. G. } of the Land Office.

Resolved, That the following be the form of the certificate to be produced to the secretary of the land office, before any patents shall issue for land lying north and west of the rivers *Ohio* and *Alleghany* and *Conewango* creek, and that the same be signed by the proper deputy surveyor of the district where the land lies, and by the district judge, or two justices of the peace in the vicinity of the said land, and that the secretary cause the said form, with this resolution, to be published in the *Pittsburgh* Gazette.

We do hereby certify, that hath made, or caused to be made, an actual settlement on a tract of land, containing acres, lying north and west of the rivers *Ohio* and *Alleghany*, and *Conewango* creek, situate, &c. (here describe the land) by clearing, fencing, and cultivating, at least two acres for every hundred acres, contained in the survey of said tract; that he hath erected thereon a messuage for the habitation of man, and resided, or caused a family to reside thereon, for the space of five years next following his first settling of the same.

(A true copy) JOHN HALL,
Secretary of the land office.

1800. "*Ohio* and *Alleghany*, and *Conewango* creek, to be unexception-
"able; if there was added a clause, conformable to the proviso
"contained in the ninth section of the act, that where the settler,
"or grantee, has been prevented making such settlement, or hath
"been driven therefrom, by force of arms of the enemies of the
"*United States*, and has persisted in his endeavours to make
"such settlement, he is entitled, as if such settlement had ac-
"tually been made and continued." (18)

Upon

(18) The proceedings on this subject are as follow:

December 21st, 1797.

The board, desirous of establishing a legal form of a certificate, to be produced to the secretary of the land office, before patents shall issue for lands lying north and west of the rivers *Ohio* and *Alleghany* and *Conewango* creek, wrote to *Jared Ingersoll*, Esq. attorney-general, for his opinion and directions on this subject, to which they received the following reply, viz.

"Gentlemen,

"The certificate proposed by you, respecting the lands lying north and west "of the rivers *Ohio* and *Alleghany* and *Conewango* creek, appears to me to be "unexceptionable in its form, provided you add a clause conformable to the "proviso contained in the 9th section, that where the settler or grantee has "been prevented making such settlement, or hath been driven therefrom by "force of arms of the enemies of the *United States*, and has persisted in his "endeavours to make such settlement, he is entitled as if such settlement had "actually been made and continued."

Whereupon, the board made the following resolution, adopting the annexed form of certificates, viz.

Resolved, That the following be the form of the certificate, or certificates, to be produced to the secretary of the land office, before any patent or patents shall issue for lands lying north and west of the rivers *Ohio* and *Alleghany* and *Conewango* creek, and that the same be signed by the proper deputy surveyor of the district where the land lies, and by the district judge, or two justices of the peace, in the vicinity of the said land; and that the secretary cause the same form, with this resolution, to be published in the *Pittsburgh* Gazette:

"We do hereby certify, satisfactory proof having been made to us, That hath made, or caused to be made, an actual settlement on a tract of land, containing acres, lying north and west of the rivers *Ohio* and *Alleghany* and *Conewango* creek, situate, &c. (here describe the land) by clearing, fencing, and cultivating, at least two acres for every hundred acres contained in the survey of the said tract: that he hath erected, or caused to be erected, a messuage for the habitation of man, and resided, or caused a family to reside thereon, for the space of five years next following his first settling the same."

Or,

"We do hereby certify, That the grantee, or settler, hath been prevented from making a settlement on a tract of land, containing situate, &c. conformable to the proviso, contained in the 9th section of the act, entitled "An act for the sale of vacant lands within this Commonwealth," passed the third day of *April*, 1792, by force of arms of the enemies of the *United States*; and that he, the said , hath persisted in his endeavours to make such settlement."

I certify, That the above, and foregoing, is a true copy of a minute of the Board of Property of *Pennsylvania*, entered in minute of property book, No. 5. pages 259 and 260, remaining in the office of the secretary of the land office

of

Upon such deliberation, and with such uniformity of opinion, in all the officers of the government, the forms of patents, as well 1800.

of *Pennsylvania*. In testimony whereof, I have hereunto set my hand and seal of the land office aforesaid, at *Lancaster*, this 14th day of *February* 1803.

(L. S.) ANDREW ELLICOTT,
Secretary of the land office.

The form of Patent adopted in case of Prevention, and issued to the Company.

THE COMMONWEALTH OF PENNSYLVANIA.

To all to whom these presents shall come, Greeting:

(L. S.) THO. MIFFLIN. KNOW YE, That in consideration of the monies paid by *John Melbeck*, into the receiver general's office of this commonwealth, at the granting of the warrant herein after mentioned, and of the sum of three pounds eight shillings and nine pence, lawful money, now paid by *Wilhem Willink*, *Nicolaas Van Staphorst*, *Pieter Stadnitski*, *Christiaan Van Eeghen*, *Hendrick Vollenhoven*, and *Rutgert Jan Schimmelpenninck*, into the said office; and also in consideration of the said *Wilhem Willink*, *Nicolaas Van Staphorst*, *Pieter Stadnitski*, *Christiaan Van Eeghen*, *Hendrick Vollenhoven*, and *Rutgert Jan Schimmelpenninck*, having made it appear to the board of property, that they were, by force of arms of the enemies of the *United States*, prevented from making such settlement on the herein after described tract of land, as is required by the 9th section of an act of the general assembly of this commonwealth, passed the third day of *April* 1792, entitled "An act for the sale of vacant lands within this commonwealth," within the time therein mentioned, and that they the said *Wilhem Willink*, *Nicolaas Van Staphorst*, *Pieter Stadnitski*, *Christiaan Van Eeghen*, *Hendrick Vollenhoven*, and *Rutgert Jan Schimmelpenninck*, have persisted in their endeavours to make such settlement, there is granted by the said commonwealth unto the said *Wilhem Willink*, *Nicolaas Van Staphorst*, *Pieter Stadnitski*, *Christiaan Van Eeghen*, *Hendrick Vollenhoven*, and *Rutgert Jan Schimmelpenninck*, of the city of *Amsterdam*, a certain tract of land called *Normandy*, situate in district No. 2, north and west of the rivers *Ohio* and *Alleghany*, in *Alleghany* county, beginning at an ironwood; thence by land of *Charles W. Peale*, south three hundred and twenty perches, to a red oak; thence by land of *Michael Canner*, west two hundred and thirteen perches, to an oak; thence by land of *William Cameron* and land of *Peter Baynton*, north, three hundred and twenty perches, to a white oak; and thence by land of *Isaac Paxton*, east, two hundred and thirteen perches, to the beginning, containing four hundred and one acres one hundred and fifty perches, and the allowance of six per cent. for roads, &c. [which said tract was surveyed in pursuance of a warrant, dated the eighteenth day of *April* 1792, granted to the said *John Melbeck*, who by deed, dated the fifth day of *January* 1797, conveyed the said tract to the said *Wilhem Willink*, *Nicolaas Van Staphorst*, *Pieter Stadnitski*, *Christiaan Van Eeghen*, *Hendrick Vollenhoven*, and *Rutgert Jan Schimmelpenninck*] with the appurtenances. To have and to hold the said tract or parcel of land, with the appurtenances, unto the said *Wilhem Willink*, *Nicolaas Van Staphorst*, *Pieter Stadnitski*, *Christiaan Van Eeghen*, *Hendrick Vollenhoven*, and *Rutgert Jan Schimmelpenninck*, their heirs and assigns, to the use of the said *Wilhem Willink*, *Nicolaas Van Staphorst*, *Pieter Stadnitski*, *Christiaan Van Eeghen*, *Hendrick Vollenhoven*, and *Rutgert Jan Schimmelpenninck*, their heirs and assigns forever, free and clear of all restrictions and reservations as to mines, royalties, quit-rents, or otherwise, excepting and reserving only the fifth part of all gold and silver ore, for the use of this commonwealth, to be delivered at the pit's mouth, clear of all charges. IN WITNESS whereof, THOMAS MIFFLIN, governor of the said commonwealth, hath hereto set his hand, and caused the state seal to be hereunto affixed, the seventh day of *October*, in the year of our Lord one thousand seven hundred and ninety-nine, and of the commonwealth the twenty-fourth.

Attest,

JAMES TRIMBLE, Dep. Sec'ry.

1800. as the forms of the certificates of settlement, or of prevention, were fixed and declared. The Population Company (an association formed on similar principles and with similar views) received on the 4th of *February* 1799, patents for numerous tracts of land, upon exhibiting the proofs of prevention prescribed by the board of property. The *Holland* company applied for patents for all their tracts, and have actually received patents for 876 tracts; the other patents being then withheld, merely for the purpose of a re-survey, which the surveyor general directed to be made, in consequence of the inaccuracy of the deputy surveyor. But before the re-survey could be executed, a change had taken place in the land officers; a new construction was given to the proviso, attached to the 9th section of the act; it was insisted, that no patent could issue unless the terms of settlement and residence were, at some period, completed, though the obligation to complete them, during the *Indian* war, was suspended; and the resolutions and proceedings of the former board of property, on the subject, were not deemed authoritative and conclusive upon the present board. At the same time, a number of persons intruded upon the lands of the warrantees, on the pretence that the forfeiture for non-settlement, was absolute, at the expiration of two years from the date of the warrants, and set up claims as actual settlers. When, therefore, the *Holland* company renewed their applications, for the rest of their patents, the secretary of the land office refused to issue them; and the present motion was made to compel him to do so, as an official duty, by a writ of *mandamus*. (19)

Such were the circumstances (collected from evidence, of unquestionable notoriety, from testimony in the cause, or from concessions of counsel) upon which the controversy arose. The general question was, whether the *Holland* company had performed the condition of improvement, settlement, and residence, annexed to the sale of the lands: or were released, by the operation of the proviso to the 9th section of the act, from the obligation to perform it? And the arguments in support of the rule, embraced three distinct objects of inquiry: 1st. The facts relative to the hostile state of the country, and the persevering endeavours of the *Holland* company to accomplish the settlement prescribed by the act. 2d. The construction of the proviso, attached to the 9th section of the act. 3d. The propriety of proceeding, in this case, by *mandamus*.

1st. Of the facts relative to the hostile state of the country; and the persevering endeavours of the *Holland* company, to accomplish the settlement prescribed by the act.

(19) Several objections were made, in the course of the argument, to the form of the certificates produced by the *Holland* company; but these, and other objections in point of form, eventually yielded to a discussion and decision of the general question.

Whatever may be the effect of the proviso in suspending, or releasing, the obligation to settle and improve the land, the case in which it operates cannot be mistaken. If a grantee in any warrant is prevented, *by force of arms* of the enemies of the *United States*, from making an actual settlement, it is the express case of the proviso: but, it will not be contended, that the force of arms, here mentioned, means an actual application of military force, the tomahawk, or the rifle, either to drive a man from his settlement, or to prevent his entering upon the land, with a view to settle it. A well grounded apprehension of personal violence and danger, from a public enemy; a terror arising from the force of arms in the neighbourhood; are equally within the spirit and protection of the law. 1800.

The actual state of hostility is proved in every possible way. The army of the *United States* was opposed to the *Indians*, as to a public enemy, and, with various success, from the year 1783, to the year 1795. At the time of passing the act, of the 3d of *April* 1792 (and, certainly, this fact furnished the inducement, for inserting the proviso to the 9th section) the whole of the north western frontier of *Pennsylvania* was in constant danger and alarm. For some time after the act was passed, the deputy surveyors did not dare to venture upon the execution of the duties of their office. And, until the spring of 1796, not an actual settler inhabited the country, except, perhaps, a few bold and enterprising men, in the vicinity of a garrison. But the constitution of the *United States*, has declared "that no state shall, without the consent of con-"gress, lay any duty of tonnage, *keep troops*, or ships of war, in "*time of peace*, &c. or engage in war, unless actually invaded, or "in such imminent danger as will not admit of delay." *Art.* 1. s. 10. Now, the state of *Pennsylvania* did raise and maintain troops, for the defence of her western frontier, from the 17th of *March* 1791, until the spring of the year 1796, alleging "that "there was imminent danger of being invaded by the *Indian* "tribes, then at war with the *United States*; and that it was ne-"cessary to take immediate and vigorous measures to prevent "hostile incursions, and to provide for the security of the fron-"tier inhabitants of this commonwealth." The military operations of the state, must, therefore, be regarded, on constitutional ground, as the best evidence, that a war existed; and the effects of that war, in preventing the settlement and occupancy of lands lying north and west of the rivers *Ohio* and *Alleghany*, and *Conewango* creek, cannot be more forcibly pourtrayed, than in the legislative and executive declarations and acts of the government. The judicial authority, indeed, has already settled the fact, that hostilities existed from the time of passing the act, until the ratification of general *Wayne's* treaty; and, without limiting the operation of the fact to a mere suspension of the condition of settlement, improvement, and residence, the operation so far, at

1800. at least, was expressly recognised, during the continuance of hostilities, in the case of *Morris's Lessee* v. *Neighman*.

But, notwithstanding the hostile state of the country, the *Holland* company commenced and prosecuted their attempts to settle and improve the land, during the whole period of the war, in a manner equally meritorious and beneficial. It is true, perhaps, that an attempt was not made to settle each particular tract; but the general effort to settle the whole, was all that could be reasonably expected, under such circumstances; a combination of force and capital could alone diminish the danger to be encountered; and the result greatly contributed to establish a barrier against the incursions of the *Indians*. To the exertions during the years 1794 and 1795, while the war continued, must be added the *perseverence* of the company, in their endeavours to settle and improve in every subsequent year. During the war, the disbursements for purchase money, and charges of improvement, amounted to near 230,000 dollars; and since the war, besides the allowance to settlers, the disbursements of cash, have exceeded 178,000 dollars. Nor, ought it to be forgotten, that after the dangers of war had ceased, another evil, almost as embarrassing, interrupted, annoyed, and, in many instances, frustrated the endeavours of the company. Rumours, raised and circulated by artful and interested men, and countenanced by the obscure and equivocal language of the law, were heard to insinuate, that the warrantees had incurred a forfeiture of their lands, by the lapse of two years from the dates of the warrants, notwithstanding the terms of the proviso. Some of those persons, who had engaged to settle for the company, began to assert a right of settlement for themselves. Hordes of intruders were pressing eagerly into the possession of the best tracts: and, in short, such was the doubt and solicitude, universally excited upon this question of forfeiture, that the warrantees could hardly obtain assistance, in the business of settlement and improvement, upon the most liberal terms of participation in the land, or payment of expenses. Although these occurrences will sufficiently show the impracticability of settling each particular tract, even since the peace; and although they increased the difficulties to be surmounted, in the general effort to settle the whole; yet the integrity, enterprise, and perseverance, of the company, to effectuate the settlements, were uniformly displayed, and have, on every occasion, been candidly applauded. Upon motives of interest, as well as upon the principles of their contract, they "persisted in their endeavours:" for, even after the board of property had decided, that they had acquired a legal title to the lands, and issued patents in their favour; even at the moment of the present discussion; they have been, and are, employed (anxiously, laboriously, and expensively employed) in completing the settlement and improvement of every tract, which they have purchased.

Let

Let it, then, be recollected, that this controversy does not arise between contending individuals, claiming under adverse titles; but between individuals, who have long paid for the lands, and the commonwealth, who annexed to the sale certain conditions, to be released on a certain event, which event has actually happened. Of the forfeiture, if a forfeiture has accrued, the state alone can take advantage; and, independent of the strict legal question, will it be pretended, that, on any principle of equity, the advantage of a forfeiture ought, in such a case, to be taken? The obstacle to a full compliance with the conditions of sale, proceeded from a public calamity, against which it was the duty of the government to protect its citizens; the existence and operation of which the individuals could not avert, or controul; and for the consequences of which they ought not, upon the soundest maxims of civil policy, to be condemned to suffer. But, if it was the object of the state to replenish her treasury by the sale of her western lands, that object has been promoted by the sale to the *Holland* company, far beyond what could reasonably have been hoped. If the object was to strengthen and secure the frontiers, that object too, has been more effectually obtained by the general operations of the company, than it could have been by the weak and unconnected efforts of particular men: and if it is the spirit and policy of our laws, that the country should be settled, its soil cultivated, and the arts of social life extended, what country was ever more rapidly, or more by the exertions of a single association, converted from a desert and a wilderness, into a scene of population, industry, and prosperity? Every inhabitant, every traveller, every writer, will be found in unison upon this subject; and even the secretary of the land office, whose conduct has occasioned the present motion for a *mandamus*, has appeared as the eulogist of the *Holland* company; exhibiting the merit and the success of their example, as an instrument to procure the public patronage for his own project of settlement, in other parts of the state. 1800.

Whatever, then, is the law, it must prevail: but it will not be denied, that a claim to a liberal and equitable construction of an ambiguous law, never was better founded. Prevented from accomplishing the settlements designated in the act by a public enemy; opposed in the prosecution of those settlements by intruders, who derived, indeed, some colour for their pretensions, from an imperfect expression of the legislative meaning; and thrown off their guard by the deliberate decisions of the board of property, and the authoritative proceedings of the public officers, under the seal of the commonwealth; can it be conscientious, can it be just, can it be honourable, that the *Holland* company, after a labour of eight years, and an expenditure of 400,000 dollars, should be condemned to a forfeiture of the lands, for which they have paid the full consideration, in favour of the state, who has received that consideration; who, if there has been error or mistake,

1800. take, the error or mistake, lies in the persons of her officers; and who, if the doctrine of forfeiture prevails, will not only retain the consideration money, but resume the soil, in absolute ownership, with all its ameliorations and improvement! Strange as it would appear, to exact a forfeiture, under such circumstances, for the benefit of the state, the occurrence would be still more extraordinary, if it had only the effect, to take the land from a meritorious warrantee, and to give it to a lawless intruder. Till the forfeiture is regularly established, till the government has determined to take advantage of it, and until a second warrant has issued, reciting the default of the first warrantee, any attempt of an individual to seize and retain the possession of the land, merits, not *reward*, but *punishment*. If such conduct should receive an executive, a judicial, or a legislative, countenance, a scene of conflict, litigation, and tumult, must inevitably ensue, fatal to the rights of property, and the peace of the community. The spirit of interested jealousy, will extend its baneful influence, over what has been sanctioned with the seal of office; intrusions and forcible entries will generate riots and civil feuds; the company will be despoiled of every benefit from their patents, their labours, and their disbursements; and, if right is not to be passively surrendered to violence, the state will ultimately find another insurrection to suppress.

To avert the danger of such a scene, as well as to obtain a safe and certain guide for their conduct, the *Holland* company have anxiously sought the opinion of this Court; and, they trust, that exceptions to form, will not be permitted to defeat the present opportunity, to place the subject on a permanent foundation, just to the public, beneficial to settlers, and useful to warrantees. Unless, indeed, a judicial construction of the law can now be obtained, exertions and success will be in an inverse ratio: exertions will be greater, but settlements will be fewer in each succeeding year; until despair takes the place of enterprise; and the whole business of settlement and improvement shall be abandoned to occupants, whose only title is force, without patent, without warrant, and without purchase.

2d. The construction of the proviso, attached to the 9th section of the act of the 3d of *April* 1792.

The exposition of the proviso, has produced a variety of propositions. 1st. By some, it has been supposed, that unless the terms of improvement, settlement, and residence, had been strictly performed, within the respective periods of two years, and five years, a forfeiture accrued, though a war had raged throughout, and beyond those periods. 2d. Others, admitting a qualified suspension of the condition during a war, have, nevertheless, held, that no title could be acquired, until the performance of the terms of improvement, settlement, and residence, though the war should last for a century; nor even then, unless the warrantee

rantee had, during the whole war, persisted in his endeavours to perform them. 3d. A third construction maintains, that if a warrantee has been prevented, by force of arms, from accomplishing the improvement, settlement, and residence, designated in the act, but has persisted in his endeavours to accomplish them, during the time mentioned in the 9th section, the proviso operates as an extinguishment of the condition, and the title becomes absolute. And, 4th. It has been asserted, that a warrantee, having been prevented by war, from making the improvement, settlement, and residence, during the time mentioned in the act, will acquire an absolute title, if he persists in his endeavours for a reasonable period, after the expiration of the war, though all his endeavours should prove ineffectual. 1800.

1st. The *first* opinion is at once extravagant, and iniquitous. No rational man, during the existence of a war, which he could not resist, or terminate, would have formed a contract of such a nature. Nor is it conceivable, if this were the design and meaning of the legislature, that the proviso would have found any place in the act, unless, indeed, fraud and deception can be imputed to its authors; and, it is to be presumed, that an inconsistent, repugnant, and ambiguous, proviso, has been employed, as the instrument to effectuate them. The enacting part of the 9th section prescribes a settlement to be finished in two years, and a residence to be continued for five years; and unless the proviso, either dispensed with the settlement and residence altogether, or enlarged the periods for accomplishing them, it is utterly impossible to ascribe to it a motive, or a use.

2d. The *second* opinion is, also, pregnant with inconvenience, injustice, and absurdity. If it affords the legitimate construction of the act, it applies equally to the case of the actual settler before warrant, and to the case of the warrantee, with a view to actual settlement. The price of the land could not, therefore, be collected for the use of the state, nor could a title be acquired by the individual for a century, if the war should last so long; nay, even at the termination of a long protracted war, the individual would be without remedy, unless he could prove, that, whatever might be the intermediate expense, or danger, his endeavours to accomplish a settlement, had never been suspended, or remitted. Consider the state of the country, and such a condition annexed to the purchase of lands, would inevitably frustrate the primary intention of the legislature.

2d and 3d. But it is not directly denied, that the right of the *Holland* company is alive; and it is insinuated, that the opposite arguments, do not militate against future grants, if the company shall go on to complete the settlements and residence described in the act. It is proper, therefore, to consider the *second* and *third* constructions of the 9th section, connected with each other,

1800. and with the facts arising in the present case. The concession of the opposite counsel, is, indeed, an acknowledgement of the inception and progress, but a denial of the maturity, of the company's title: while, it is contended, for the company, that although the enacting part of the 9th section constitutes a condition precedent, to the vesting of a legal title in the warrantees, that condition is totally superseded, or extinguished, if the case of the warrantee is embraced by the descriptions of the proviso; so that he thereupon acquires a legal title, without settlement, improvement, or residence.

By the act, two descriptions of settlers are contemplated: 1st. Those who have made improvements and settlements without warrants; and, 2dly. Those who apply for warrants, with a desire to settle and improve. On both descriptions it is imposed as a condition precedent, that they shall pay the price of the land, when warrants are taken out; that they shall pay the expense of surveys; and that they shall improve, settle, and reside, in the manner, and for the period, prescribed. It is to be remarked, however, that a distinction is made, in one respect, between the settler, and the warrantee; the former being bound to fulfil the condition precedent *personally;* and the latter being authorised either to do it himself, or to *cause it to be done* by others. This, which, at the first blush, might appear an advantage to the warrantee, is converted into a hardship and an injury, the moment the suspicion of forfeiture insinuates itself among the class of people, who are to form the actual settlers. There is another distinction, also, that the actual settler must pay interest from the date of the improvement; and he was bound to apply for a warrant within ten years after passing the act; (20) but, on the other hand, the land and personal property of the warrantee and actual settler were equally exempt from state taxes, for the same period; and, it is urged, that the price of the land was trifling, compared with its real value. Let it be answered, however, that the exemption from taxes can hardly be regarded as a favour; and the lowness of the price affords no reasonable ground of argument. The settler without warrant is charged an interest, and the settler with warrant advances his money. From the fund created by warrantees, invested in the bank of *Pennsylvania* and in public stock, the state has drawn a great portion of that revenue, which has been adequate, for many years, to all her objects of public expenditure and improvement. Besides, no state tax was then imposed, there was none likely to be imposed for ten years; and, the fact is, that even at this day a state tax is not in existence, nor in contemplation. The lowness of the price, too, arose from an avowed consciousness that a great part of the public lands would not sell higher; and, as to the rest, the price would be ex-

(20) The period has been enlarged. See 6 *vol. p.* 25.

orbitant,

orbitant, indeed, on the principles of the opposite construction. After all, the wealth of the state consists in its population, and advancement in the arts of agriculture, commerce, and manufactures, not in the mere accumulation of coin. 1800.

These preliminary remarks are suggested, with a view to place the controversy on its real footing; on the footing of a bargain, in which the seller and the purchaser equally consulted their respective interests, and are equally bound (though the one is a state, and the other a private person) by the terms of the contract. It is agreed, that there was a condition precedent, which must be performed, or be dispensed with, upon the terms of the contract, before any title could vest in the warrantees. It is, also, agreed, that the condition precedent has not been strictly performed; for, more that two years have elapsed since the date of the warrants, but no such settlement, improvement, and residence, have been made and continued, as the enacting part of the 9th section describes. What, then, is the operation of the contract, under such circumstances, connected with the *Indian* war? The adverse counsel will not explicitly aver, that the result is an absolute forfeiture of the lands; but they peremptorily deny, that it amounts to a release, or extinguishment, of the condition precedent. Where, however, is the expression to be found, that, the predicated event, dispenses with the condition in part, and adheres to it in part; that dispenses with the limitation of time, for performing the act, but, nevertheless, insists upon the act being performed? Even in the condition precedent, a residence of five years is not, in every case, necessary: for, it is only required, (independent of hostilities) if the warrantee, or settler, "shall so long live." That cause of absolute dispensation, with respect to residence, must often occur; and it is reasonable to conclude, that the existence of hostilities was, likewise, considered, and intended as entitling the party to an equal degree of indulgence.

But, after all, it must be agreed, that the wording of the act is, in some places, incoherent and absurd. Thus, on a grammatical construction, the actual settlement described by the 9th section, comprises a residence of five years; and, yet, the same actual settlement is required to be made within two years from the date of the warrant. Subsequent passages, indeed, treat actual settlement and residence, as distinct objects; but, another confusion of ideas is introduced: for, we find that the party is called "*such actual settler*," though he has been "prevented making "such *actual settlement*," and, it is provided, that "if he is *pre-*" *vented* from making an actual settlement, but *persists* in his en-" deavours to make it, he and his heirs shall have and hold the "lands, in the same manner, *as if the actual settlement had been* " *made and continued.*" From the difficulties of the language of the act, therefore, we must endeavour to rescue ourselves, by ascribing to the legislature a meaning, which, while it comports with

1800. with a rational exposition of the words, shall be consistent with public policy and the principles of justice.

The state, having received the money of the warrantees, was naturally led, from the existing hostilities, to contemplate the injury to which their purchase was exposed. Whether the hostilities would prevent the settlement, or not, it might be difficult to foresee; but the legislature, in offering the lands for sale, must have held out the probability, that there would be a safe opportunity to settle; or the condition of settlement could never rationally and fairly have been proposed. If, therefore, the opportunity, implied in this overture, was defeated, it seems to follow as a legitimate consequence, that the condition ought not to be enforced. Consider, for a moment, the situation of a warrantee, bound by the strict condition to settle, or, by the dispensing proviso, to persist in his endeavours to settle. He must explore, locate, and survey, each tract, before he can attempt to settle. He must collect, appropriate, and apply, the funds necessary to defray the various expenses of settlement, improvement, and residence. He must be in constant preparation to seize and employ the opportunity for settling. Under such obligations the mere pecuniary charge of watching, for a safe occasion to enter upon his lands (independent of time, labour, and anxiety) would, in most instances, be greater, than the cost of actual settlement, in a season of public tranquillity. Exhausted in money, perplexed by doubt and suspense, grown old and infirm in a course of exertion, or persistence, what pretext could justify an accumulation of such disappointment, injury, and loss, by exacting a forfeiture of the lands? The peace warrantee, who has waited till the storm has passed away; or the intruder, who, at the close of a war, usurps the name of actual settler, has none of these calamities to encounter; and, yet, no greater price has been paid, no other conditions are imposed, in either of those cases, than in the case of the warrantee, who is defeated in all his exertions, and drained of all his resources, by the unavoidable operations of a public war!

Is there, then, no principle of justice and humanity, to claim relief from the legislature, upon the construction, for which the *Holland* company contend? Would it be unreasonable to suppose, that under such circumstances, the legislature intended to vest in the persevering, but unsuccessful, warrantee, an absolute estate in the land, upon which he might establish a credit, to furnish means for renewing his exertions, and ultimately compensating his advances and his labours? If the supposition involves nothing unjust, or irrational, the frame of words will sufficiently serve to give it body and effect. Thus: it is declared, that should the grantee "be *prevented* from making such actual settlement," and persist in his endeavours to make it, he shall hold the lands, as if it were made and continued: but the word *prevented*, implies that

that he had failed; and *persisting in an endeavour*, does not import *succeeding* in it. Again: the grantee is to have the lands," if he persists in his endeavours *to make* such actual settlement: but this does not involve a condition, that he shall persist *until* he has made it, or *so as* to make it; and "*endeavouring to make*," is an expression that designates an attempt, not a performance. Again: If the grantee is prevented, but persists in his endeavours to settle, he is entitled "to have and to hold the lands, in the "same manner, *as if* the actual settlement had been made and "continued:" but no title could vest in the grantee, unless the condition precedent was performed; and, yet, by force of the proviso, he is *to have the lands* (not merely the benefit of a prolongation of the time for settlement) in a case, where from the hypothetical terms employed, it must be clearly understood, that the condition had not been performed. Again: The grantee, being prevented, but persisting in his endeavours to settle, is, by force of the proviso, to have and to hold the lands, "*in the same* "*manner*," as if the condition precedent had been performed: but if the condition precedent had been performed, the grantee would have held the lands in fee, discharged from any limitation, contingency, or incumbrance whatsoever; and, consequently, in this case, to enable the grantee to hold *in the same manner*, persisting in his endeavours to settle, must be considered as tantamount to actual settlement and residence. In short, in every sentence of the proviso, the legislature plainly points at a certain state of things, at some concurrence of circumstances, when the grantee would be absolutely entitled to the land before, and without, making and continuing, an actual settlement. 1800.

The only question, then, must be, what is the nature of the endeavours prescribed; during what period the endeavours are to be made: and how long the grantee is bound to persist? The actual settlement must be made, or excused, within two years from the date of the warrant; and the residence must not only be five years, but five years next following the first settlement. The time, therefore, is a characteristic of the condition precedent; an ingredient in the definition, as essential to the contract, as the nature of the act required to be performed. If the time is as *essential*, it is as *limited*, as the nature of the act to be performed; and hence, does it not follow, that at the expiration of two years, as to the settlement, and of five years, as to the residence, the condition must be actually performed, or virtually annulled? The excuse for non-performance is, also, limited; since, on an allegation of being prevented from settling, or residing, the grantee must state the force of arms, which prevented him, to be within, and until the end of two years (as to the settlement) next immediately after the date of his warrant; and within and until the end of five years (as to the residence) from the date of his first settlement; or his plea shows no dispensation from the condition.

1800. tion. Thus, the time, within which performance is to be effected, or an apology for non-performance to be received, is the same, or, at least, commensurate: and if the period, within which the substitute for performance is exacted, within which the endeavour to perform must be shown, cannot be extended in favour of the warrantee, what right, express or implied, can there be, on the part of the state, to insist on a continuance of the endeavour, beyond the period, within which the contract obliged her to accept it, as a commutation for the performance? Equality is equity, whoever may be the parties to the bargain; states, or individuals: but it would be a doctrine of arbitrary prerogative, if performance, or endeavours to perform, should only avail the grantee, to release him from the condition, within a limited period; yet, that the obligation to perform, or to persist in the endeavour to perform, should be indefinite and perpetual. Nor is the idea correct, that the war excused the warrantees from endeavouring to effect a settlement, during its continuance; and that the law contemplated a perseverance only when it could be effectual. On the contrary, the law obviously required a perseverance in the endeavour to settle, during the war; but left the degree of perseverance to be regulated, by considerations of a reasonable discretion, and personal safety. That this was the construction of the *Holland* company, appears incontestibly from the immediate steps which they pursued to complete their surveys and improvements: and this is, in truth, the material ground of complaint against the opposite doctrine; that, by the contract, the grantees were obliged to make laborious, hazardous, and expensive exertions, during the war; and, yet, at the conclusion of the war, derive no advantage from those exertions, in consummating the legal title to the lands.

On the doctrine, that the grantee, or settler, must persist in his endeavours to improve and reside, for any other periods, or beyond the respective periods, of two and five years, let it be asked, when those other periods are to commence, and how long are they to be protracted? The law itself is silent; and, yet, if an intention of that kind had been entertained, how easily, and how certainly, would the legislature have said, that "the "grantee shall have the lands, if the settlement is completed, "within two years, after the cessation of hostilities, and the resi- "dence continued for five years subsequent to the same epoch." But by whom shall the silence of the law be supplied? What power exists to add the slightest circumstance to the terms of the contract? The legislature, as a party, cannot explain, or expound, it. The Courts of justice can only declare the meaning, from the fair and genuine import of the language of the act: they cannot diminish, or enlarge, the vested rights of individuals, any more than they can supersede the rights of the state. And, on this occasion, the officers of the land-office, have only a ministerial function to perform. Let it, therefore, be repeated, that the

the proviso to the 9th section, having rested the consummation of the grantee's title, simply, upon the persisting in an endeavour, it would be creating a new contract, making a new law, introducing another principle, and amplifying the words of the legislature, to require, not a persevering endeavour, but an actual performance. Besides; would it be just to fix upon the close of the war, as the period for commencing the endeavour, without giving some credit for the exertions of the grantee, or the settler, *flagrante bello?* And, yet, who shall make the apportionment, of time, of labour, and of expense; and upon what principle can it be made? It often happens, that what is intended to afford an undue preference to a favourite, in a remote consequence, proves peculiarly injurious to him. The merits of the actual settler have sometimes been enhanced, in order, by an invidious comparison, to depreciate the claims of the purchaser, or warrantee: but, it is obvious, that a determination, upon the ground taken by the opposite counsel, would operate more severely, with greater cruelty, towards the actual settler, than any consequence that can flow from the construction urged in favour of the *Holland* company. For instance: A man enters upon his lands in the year 1792, with a view to make the improvements, which the act requires. He is attacked by the *Indians*, and driven from his cabin and and his field, before he has time to make any visible progress in building, clearing, and cultivating; but, he observes, in the words of the act, that being driven from his settlement, he shall, nevertheless, have title, *as if* he had completed his improvement, and continued his residence, if he persists in his endeavours: he, therefore, returns the next year, and is again driven away, *re infecta;* and so on, for a succession of years. Shall such a perseverance be accounted as nothing? And, is it not obvious, that to require that the actual settler shall be driven away, and constantly kept away, and yet shall complete the settlement and residence, places him in a condition more grievous, than even the case of the warrantee, who is merely prevented from entering and improving the land? 1800.

Upon the whole, then, let the proviso operate as a release of the condition precedent, or let it be taken as qualifying the condition, and requiring a reasonable perseverance during, or after, a war, the claim of the *Holland* company must be established. They persisted, in spite of every danger, while hostilities raged; and more than five years have elapsed, since the *Indian* treaty, during which they have, also, persisted.

3d. Of the propriety of proceeding, in this case, by a *Mandamus*.

In entering upon this part of the discussion, it is proper to inquire, whether the construction given by the board of property to the proviso, is not conclusive. It was given after great deliberation,

1800. beration, and upon the legal advice of the law officer of the state. Patents have been issued, in pursuance of the construction; and transfers have been made and accepted upon the faith of the public grants, under the great seal. *Stare decisis*, is a maxim to be held forever sacred, on questions of property; and, in the present instance, applies with peculiar force, as the rule was given by the state herself, through the medium of her officers; and with her alone, not with any individual, can a conflict arise. The board of property is of a judicial character, and had jurisdiction in the present case. 2 *vol. State Laws*, *p.* 21. *s.* 2, 3. 3 *vol.* 2. 456. 4 *vol.* 476. 3 *vol.* 213. 311. There is no revisionary, or appellate, authority established for questions of this nature: and, certainly, the secretary of the land-office, though a constituent member of the board of property, is merely, as secretary, a ministerial officer, bound by the decisions of the board, though contrary to his own opinions. His ministerial duties (of which it is one, that he shall obey the orders of the board of property) are stated in the several laws, relating to the land-office, and they have received a practical exposition, which devolves on him the care of preparing patents for the governor's signature, and the seal of the state. He is bound, then, to execute the public laws, relating to the land-office; and, if he refuses to do so, the Court will compel him by *mandamus*, on general principles, as well as on the authority of particular cases.

The general principle of the *mandamus*, points at cases, in which there is no other legal, specific, remedy, for a satisfaction in damages is not regarded, in such cases, as an adequate reparation: and then it may be awarded to any public, or private, person. 1 *Woodes. Lect.* 118. 3 *Black. Com.* 110. 3 *Burr.* 1267. 1659. 4 *Burr.* 2188. 2 *Burr.* 1045. 3 *T. Rep.* 651. 1 *T. Rep.* 404. *Douglas*, 568. The particular instances are numerous. It lies to compel the ordinary to grant letters of administration: 1 *Black. Rep.* 640. To compel the delivery of an administration bond to be put in suit: 4 *Bac. Abr.* 508. *Cowp.* 140. To compel the grant of a licence to a curate, if refused without just reason: 4 *Bac. Abr.* 502. 506. 2 *Stra.* 797. To compel the proper officer to affix a seal: 4 *Bac. Abr.* 509. Or to register a certificate, being merely a ministerial act: *Id.* 508. 1 *Wils.* 283. To compel the party to proceed in proving a will: *Raym.* 235. 15 *Vin. Abr.* 203. To oblige any officer to do his duty: 4 *Com. Dig.* 207. To compel obedience to things enjoined by statute: 2 *Stra.* 992. To compel the enrolment of a testament, which by custom ought to be enrolled: 2 *Roll. Abr.* 106. 1 *Sid.* 443. To compel a clerk of a company to deliver up books: 1 *Stra.* 879. To compel an old officer to deliver records to a new one: 1 *Sid.* 31.

The arguments in opposition to the motion for a *mandamus*, were arranged under three considerations: 1st. What is the real import

import of the condition precedent: 2d. What the *Holland* company had performed, to vest in them a legal title to the lands: and, 3d. Whether a *mandamus* does lie to the secretary of the land-office, even if the company are entitled to patents. 1800.

1st. What is the real import of the condition precedent.

This general inquiry, naturally, divides itself into a view of what must be accomplished, by persons, who meet with no prevention from the enemies of the *United States*; and of what must be done, even by persons who are so prevented; in order to obtain a legal title to the land. The policy and object of the legislature, are to be ascertained, by the circumstances which induced them to pass the act of the 3d of *April* 1792. Before it was passed, and at the time of passing it, there was a subsisting *Indian* war; and the treaty of 1794, between the *United States* and *Great Britain*, had not removed the causes of irritation, and apprehension, in relation to that power, which extended along the northern and western boundaries of the state. Hence, it became of the greatest importance, to advance the range of settlement; and to interpose the barrier of a bold and hardy population, in the quarter, where danger was so apparent. Treasure was, obviously, only a secondary consideration; and settlement itself was only stipulated where the danger existed. Thus, the lands east of the *Alleghany* were offered for sale, unshackled with conditions of settlement; while those on the west, could never be vested in any individual, upon any other terms, than those of actual settlement and residence. The steady caution of the legislature on this point, is conspicuous in almost every section of the act. The sale is only offered to persons, who will cultivate, improve, and settle the lands. 3 *vol. p.* 209. *s.* 2. An actual settler, without warrant, is so highly regarded, that although the law would deem him a trespasser, on general principles, the act prohibits any deputy surveyor from surveying any settled land, but for the owner of the settlement. *s.* 5. *p.* 210. A period of ten years credit is given to an actual settler for the price of his land. *s.* 10. *p.* 210. The land is exempt from direct taxes for an equal term. *s.* 12. *p.* 213. And when the legislature, in the year 1794, closed the land-office, it was with an express exception in favour of actual settlers. 3 *State Laws*, 637. (21) In addition to these proofs of the policy and design of the legislature, it must be of great force to recollect, that shortly before the time of offering the land for sale at the rate of 7*l.* 10*s.* per 100 acres, the state had paid to the *United States*, at the rate of three-fourths of a

(21) The land office appears to have been closed, upon the suggestion of the governor, that warrants had issued for a greater quantity of land, than the state owned; and not with a view to favour actual settlers. See the governor's message of the 2d of *Sept.* 1794.

1800. dollar for every acre, contained in the triangular tract bordering on lake *Erie*. (22)

The language of the act ought, then, to be expounded, in consistency with the policy, that gave it birth; and this can only be done, by considering the effect of a prevention, by a public enemy, to be a suspension, and not an extinguishment, of the obligation, to settle and reside upon the land. The legislature must have presumed, that, notwithstanding the existence of the *Indian* war, there would be an extension of the western settlements; the accomplishment of a settlement was made a *sine qua non*, to the investment of a legal title; and the proviso declares nothing more, in effect, than that the war shall be an excuse for non-settlement, while it continues, and the warrantee sincerely persists in his endeavour to settle. But an endeavour to settle must be shown, whether war raged, or not; and the endeavour must be to settle every tract, (each being the subject of a separate grant) not a general effort to improve an extensive and indefinite range of country. It being the spirit of the contract, that the land should be settled, no argument ought to avail on the score of the warrantee's having paid the stipulated price; and the word settlement, wherever used, is pregnant with all the consequences, of building, cultivation, and residence, described in the 9th section of the act. It is now too late to complain of hard terms. Whatever was intended, and undertaken, by virtue of the law, it is just and lawful to enforce. Say, even that a forfeiture has been incurred, and insisted on, it can be no reason, at this day, to reproach the government. That point, however, is not urged; for, every argument, used on the present occasion, to oppose the *mandamus*, is perfectly consistent with the idea of future grants, or patents, being issued to the *Holland* company, if they persevere, and, in a reasonable time, comply with the requisites of the condition precedent.

2d. What have the *Holland* company performed to vest in them a legal title to the lands.

It must be repeated, that every tract is the subject of a distinct grant; and that the condition precedent attaches to each tract. Nor does it affect the obligations of the condition, that the *Holland* company are the holders of all the warrants in question; for, the law is the same, as if each warrant belonged to a separate individual owner. Have the company, then, shown an actual settlement, or even an endeavour to settle, upon each of the tracts? The evidence exhibited by the company themselves, establishes a contrary position. Can it be sufficient to say, that they have improved a great deal of the country, and, therefore, are entitled to hold what they have not improved? The spirit of monopoly,

(22) The payment was made in public certificates; which, it was insisted, were greatly depreciated in value.

was

was an evil against which the legislature meant to guard, by dividing the territory offered for sale into tracts, and restricting the right of purchase to a single tract. It is true, that the contrivance of opulent speculators has evaded the legislative precaution; and instead of each settler being the owner of the tract on which he resides, he is the mere instrument of an association of foreigners (who never have visited, and, probably, never will visit, *America*) to obtain, for their emolument, the lands, which the state had offered for sale, with very different views of policy and benefit. 1800.

Let it be admitted, however, that the *Indian* war, operated as an excuse, for not settling each tract, till the spring of 1796, yet, the ratification of general *Wayne's* treaty removed every obstacle, and was a warning to every warrantee, that the season had arrived, when, by persisting in his endeavours, he might consummate his legal title. If, indeed, no industry, or care, could have enabled the company to comply with their contract, the condition would still, perhaps, be suspended: but it is not clear, that a settlement was impracticable at any time, and certainly it has been practicable for five years past. The company have already obtained 876 patents, without a performance of the condition; and it is remarkable, that until the re-survey in 1799, they could not even ascertain, what tracts were embraced by the remaining 153 warrants. As to the lands, therefore, for which patents are now claimed, nothing more has been done by the company, than to locate and survey them; and unless the *Indian* war operated as a release of the condition, there is no title acquired.

3d. Whether a *mandamus* does lie to the secretary of the land office, even if the *Holland* company are entitled to patents.

The board of property is a Court of Justice; and should be governed by the principles of law, in relation to the proof of matters, within their jurisdiction. The certificate of prevention, framed by the order of the 21st of *December* 1797, is destitute of every characteristic of evidence; and it has even been evaded in the manner of returning it; for, the order required the signature of the proper deputy surveyor, and two Justices; but, in many instances, the certificate is signed by the same person twice, once as deputy surveyor, and again as a justice. Consider the order as a rule of practice; rules of practice are forever in the power of the Court, to alter or rescind; and the succeeding board of property could not be restrained in this respect, by the acts of their predecessors. Besides, the order of the 21st *December* 1797, is radically defective in other points. The board of property was bound to inquire for themselves, whether settlements had been completed, or prevented, within the meaning of the law; it was a judicial authority, which could not be delegated; and, yet, by this order, it was actually transferred to the deputy surveyors

1800. surveyors and justices; nor was the sanction of an oath required for the fidelity of their certificate; which, indeed, is not a statement of facts, but the declaration of a result. The introduction of such an order was, therefore, an error, and its revocation became a duty.

The secretary of the land office, in his judicial capacity, as a member of the board of property, decided against the force of the certificate of prevention, to entitle warrantees to patents: and the effect of the *mandamus* would be to compel him to do, as an executive officer, what he has declared, as a judge, ought not to be done. Nor is the act required within the duties of his office. The patent is an act of the governor; and affixing the state seal, is an act of the secretary of the commonwealth: but the secretary of the land-office can neither issue a patent, nor affix the seal, nor compel others to do so. It is to be remembered, likewise, that the board of property is established expressly as a tribunal, to advise and regulate the proceedings of the land office; and a *mandamus* ought not to issue to any of the ministerial officers, requiring an act to be done, which the board has prohibited. 2 *State Laws*, 21. 3 *State Laws*, 3. *s.* 3. 3 *Bl. Com.* 111.

But there is, both in law, and in practice, a specific, appropriate, and adequate, remedy, which supersedes any pretext for issuing a *mandamus*. If the secretary of the land office refuses to perform a duty, an application may be made to the board of property, whose orders he must obey; and if the decision of the board of property is not satisfactory to the applicant, he may institute an ejectment. By this course, order will be preserved, justice will be administered, and the interests of the state, as well as of individuals, will be protected.

After taking time for deliberation, the Judges (23) delivered their opinions *seriatim:*

SHIPPEN, *Chief Justice.* The legislature, by the act of the 3d of *April* 1792, meant to sell the remaining lands of the state, particularly those lying on the north and west of the rivers *Ohio* and *Alleghany*. The consideration money was to be paid on issuing the warrants. They had, likewise, another object, namely, that, if possible, the lands should be settled by improvers. The latter terms, however, were not to be exacted from the grantees at all events. The act passed at a time when hostilities existed on the part of the *Indian* tribes. It was uncertain when they would cease: the legislature, therefore, contemplated, that warrants might be taken out during the existence of these hostilities, which might continue so long, as to make it impossible for the

(23) Mr. *Justice* BRACKENRIDGE, having been retained, while he was at the bar, as counsel for the *Holland* company, declined taking any part in the decision of this cause.

warrantees

warrantees to make the settlements required, for a length of time; not, perhaps, until after these hostilities should entirely cease. Yet, they make no provision, that the settlements should be made within a reasonable time after the peace; but expressly within two years after the dates of the warrants. As, however, they wished to sell the lands, and were to receive the consideration money immediately, it would have been unreasonable, and, probably, have defeated their views in selling, to require settlements to be made on each tract of four hundred acres, houses to be built, and lands to be cleared; in case such acts should be rendered impossible by the continuance of the *Indian* war. They, therefore, make the proviso, which is the subject of the present dispute, in the following words: "*Provided always, nevertheless*, "That if any such actual settler, or any grantee, in any such origi- "nal or succeeding warrant, shall by force of arms of the enemies "of the *United States*, be prevented from making such actual set- "tlement, or be driven therefrom; and shall persist in his en- "deavours to make such actual settlement, as aforesaid; then, "in either case, he and his heirs, shall be entitled to have and "to hold the said lands, in the same manner, as if the actual set- "tlement had been made and continued." 1800.

When were such actual settlements to be made? The same section of the act which contains the above proviso, gives a direct and unequivocal answer to this question, "Within the space "of two years next after the date of the warrant." If the settlements were not made within that time, owing to the force, or reasonable dread, of the enemies of the *United States*, and it was evident that the parties had used their best endeavours to effect the settlement; then, by the express words of the law, the residence of the improvers for five years afterwards, was expressly dispensed with; and their title to the lands was complete, and patents might issue accordingly. It is contended, that the words "persist in their endeavours" in the proviso, should be extended to mean, that if within the two years, they should be prevented by the *Indian* hostilities from making the settlement; yet, when they should be no longer prevented by those hostilities, as by a treaty of peace, it was incumbent on them, then to persist to make such settlement. The legislature might, if they had so pleased, have exacted those terms; (and they would not, perhaps, have been unreasonable) but they have not done so: they have expressly confined the time of making such settlements, to the term of two years from the date of the warrant. Their meaning and intention can alone be sought for, from the words they have used, in which there seems to me, in this part of the act, to be no great ambiguity. If the contrary had been their meaning, they would not have made use of the word "endeavours," which supposes a possibility, at least, if not a probability, as things then stood, of those endeavours failing on account of the hostilities; and would, therefore,

1800. therefore, have expressly exacted actual settlements to be made, when the purchasers should no longer run any risk in making them.

The state having received the consideration money, and required a settlement within two years, if not prevented by enemies; and in that case dispensing with the condition of settlement and residence, and declaring that the title shall be then good, and as effectual, as if the settlement had been made and continued: I cannot conceive they could mean to exact that settlement at any future indefinite time. And, although it is said, they meant that condition to be indispensable, and that it must be complied with in a reasonable time; we have not left to us that latitude of construction, as the legislature have expressly limited the time themselves.

It is urged, that the main view of the legislature was to get the country settled and a barrier formed: this was, undoubtedly, one of their views, and for that purpose, they have given extraordinary encouragement to individual settlers; but they had, likewise, evidently, another view, that of encreasing the revenue of the state, by the sale of the lands. The very title of the act is "For the sale of the vacant lands within this commonwealth;" this latter object they have really effected, but not by the means of the voluntary settlers: it could alone be effected by the purses of rich men, or large companies of men, who would not have been prevailed upon to lay out such sums of money as they have done, if they had thought their purchases were clogged with such impracticable conditions.

I have hitherto argued upon the presumption, that the words "persist in their endeavours," relate to the grantees, as well as the settlers; but, in considering the words of the proviso, it may be well doubted, whether they relate to any other grantee, or settler, than those who have been driven from their settlements. The word "persist," applies very properly to such. The words of the proviso are, "If such actual settler, or any grantee, shall, by "force of arms of the enemies of the *United States*, be prevented "from making such settlement, or be driven therefrom, and shall "persist in his endeavours to make such actual settlement; then, "in either case, he and his heirs shall be entitled, &c." Here, besides that the grammatical construction of referring the word "persist," to the last antecedent, is best answered; the sense of it is only applicable to settlements begun, and not to the condition of the grantees. There are two members of the sentence, one relates to the grantees, who it is supposed, may be prevented from making their settlements: the other to the settlers, who are supposed to be driven away from the settlements. The latter words, as to them, are proper; as to the grantees, who never began a settlement, improper. The act, says, *in either case*, that is, if the grantees are prevented from making their settlements, or

if

if the settlers are driven away, and persist in their endeavours to complete their settlements, in either case they shall be entitled to the land. 1800.

I will not say this construction is entirely free from doubt: if it was, there would be an end of the question.

But taking it for granted, as it has been done at the bar, that the words relate to the grantees, as well as to the settlers; yet, although inaccurate, with regard to the former, it seems to me, the legislature could only mean to exact from the grantees, their best endeavours to make the settlements, within the space of two years from the date of their warrants; at the end of which time, if they have been prevented from complying with the terms of the law, by the actual force of the enemy, as they had actually paid for the land, they are then entitled to their patents. If the legislature really meant differently, all I can say, is, that they have very unfortunately expressed their meaning.

The propriety of awarding a *mandamus*, is another question, which I mean not to discuss, as I presume a decision of a majority of the Court will make it unnecessary.

YEATES, *Justice*. I have long hoped and flattered myself, that the difficulties attendant on the present motion, would have been brought before the justice and equity of the legislature for solution, and not come before the judicial authority, who are compelled to deliver the law as they find it written for decision. The question has often occurred to our minds, under the act of the 3d of *April* 1792, which has so frequently engaged our attention in our western circuits.

The *Holland* company have paid to the state, the consideration money of one thousand one hundred and sixty-two warrants, and the surveying fees, on one thousand and forty-eight tracts of land; besides making very considerable expenditures by their exertions, honourable to themselves, and useful to the community (as has been correctly stated) in order to effect settlements. Computing the sums advanced, the lost tracts, by prior improvements and interferences, and the quantity of one hundred acres granted to each individual for making an actual settlement on their lands; it is said, that averaging the whole, between two hundred and thirty and two hundred and forty dollars, have been expended by the company, on each tract of land they now lay claim to.

The *Indian* war, which raged previous to, and at the time of the passing of the law, and until the ratification of the treaty at fort *Grenville*, must have thrown insurmountable bars in the way of those persons, who were desirous of sitting down immediately on lands, at any distance from the military posts. These obstacles must necessarily have continued for some time after the removal of impending danger, from imperious circumstances; the scattered

1800. scattered state of the inhabitants, and the difficulty of early collecting supplies of provisions: besides, it is obvious, that settlements, in most instances, could not be made, until the lands were designated and appropriated by surveys, and more especially so, where warrants have express relation to others, depending on a leading warrant, which particularly locates some known spot of ground.

On the head of merit, in the *Holland* land company's sparing no expense to procure settlements, I believe there are few dissenting voices beyond the mountains: and one would be induced to conclude, that a variety of united, equitable, circumstances, would not fail to produce a proper degree of influence on the public will of the community. But we are compelled by the duties of our office, to give a judicial opinion, upon the abstract legal question, Whether if a warrant-holder, under the act of the 3d of *April* 1792, has begun to make his actual settlement, and is prevented from completing the same, "by force of arms of the "enemies of the *United States*, or is driven therefrom," and shall make new endeavours to complete the same; but fails in the accomplishment thereof, the condition of actual settlement and residence is dispensed with and extinguished?

I am constrained, after giving the subject every consideration in my power, to declare, that I hold the negative of the proposition, for the following reasons, collected from the body of the act itself:

1st. The motives inducing the legislature to enact the law, are distinctly marked in the preamble, that "the prices fixed by law "for other lands," (than those included in the *Indian* purchase of 1768) "are found to be so high, as to discourage *actual set*-"*tlers* from purchasing and *improving* the same." 3 *State Laws*, 209.

2d. "The lands lying north and west of the rivers *Ohio* and "*Alleghany*, and *Conewango* creek, are offered for sale, to per-"sons who will *cultivate*, *improve*, and *settle* the same, or *cause* "the same to be cultivated, improved, and settled, at and for "the price of 7*l.* 10*s.* for every hundred acres thereof." By sect. 2. The price of lands is thus lowered, to encourage actual settlements.

3d. By sect. 3. "Upon the application of any person who "may have settled and improved, or is desirous to settle and "improve, a plantation within the limits aforesaid; there shall "be granted to him a warrant not exceeding four hundred "acres," &c.

The application granted, is not to take up lands; but it must be accompanied, either by a previous settlement and improvement, or expressions of a desire to settle and improve a plantation; and in this form all such warrants have issued.

4th. By

4th. By sect. 5. "Lands *actually settled and improved*, prior "to the date of the entry of a warrant with the deputy surveyor "of the district, shall not be surveyed; except for the owner "of such settlement and improvement." 1800.

This marked preference of actual settlers over warrant-holders, who may have paid their money into the treasury for a particular tract; even, perhaps, before any improvement of the land was meditated, shows, in a striking manner, the intention of the legislature.

5th. By sect. 8. "The deputy surveyor of the district, shall, "upon the application of any person, who has made an actual "settlement and improvement on these lands, survey and mark "out the lines of the tract of land, not exceeding four hundred "for such applicant."

The settlement and improvement alone, are made equivalent to a warrant; which may be taken out, by section 10, ten years after the time of passing this act.

6th. I found my opinion, on what I take to be the true and legitimate construction of the 9th section; in the close of which is to be found the proviso, from whence spring all the doubts on the subject.

It has been said at the bar, that three different constructions have been put on this section.

1st. That if the warrant-holder has been prevented by *Indian* hostilities, from making his settlement within two years, next after the date of his warrant, and until the 22d of *December* 1795; (the time of ratification of general *Wayne's* treaty) the condition of settlement and residence is extinct and gone.

2d. That though such prevention did not wholly dispense with the condition, it hindered its running within that period; and that the grantee's persisting in his endeavours, to make an actual settlement and residence for five years, or within a reasonable time thereafter, shall be deemed a full compliance with the condition: And,

3d. That in all events, except the death of the party, the settlement and residence, shall precede the vesting of the complete and absolute estate.

Though such great disagreement has obtained, as to the true meaning of this 9th section, both sides agree in this, that it is worded very inaccurately, inartificially, and obscurely. Thus it will be found towards the beginning of the clause, that the words "*actual settlement*," are used in an extensive sense, as inclusive of residence for five years: because its constituent parts are enumerated and described, to be by "*clearing*, *fencing*, *and culti-* "*vating*, at least two acres for every hundred acres, contained "in one survey; erecting thereon, a messuage for the habitation "of man, and residing, or causing a family to reside thereon,

1800. "for the space of five years, next following his first settling the "same, if he or she shall so long live." In the middle of the clause, the same words are used in a more limited sense, and are coupled with the expression "and residence," and in the close of the section, in the proviso, the same words, as I understand them, in a strict grammatical construction of the whole clause, must be taken in the same large and comprehensive sense, as they first conveyed; because the terms "such actual settle- "ment," used in the middle of the section, are repeated in the proviso, and refer to the settlement described in the foregoing part: and the words "actual settlement, as aforesaid," evidently relate to the enumeration of the qualities of such settlement. Again, the confining of the settlement to be within the space of two years, next after the date of the warrant, seems a strange provision. A war with the *Indian* natives subsisted when the law passed, and its continuance was uncertain. The state of the country might prevent the making of surveys for several years; and until the lands were appropriated by surveys, the precise places where they lay, could not be ascertained generally.

Still, I apprehend that the intention of the legislature may be fairly collected from their own words. But I cannot accede to the first construction, said to have been made of the proviso in this 9th section; because it rejects as wholly superfluous, and assigns no operation whatever, to the subsequent expressions "if "any grantee shall persist in his endeavours," &c. which is taking an unwarrantable liberty with the law. Nor can I subscribe to the second construction stated, because it appears to me to militate against the general spirit and words of the law, and distorts its great prominent features in the passages already cited, and for other reasons, which I shall subjoin. I adhere to the third construction, and will now again consider the 9th section. It enacts, in the first instance, that "no warrant or survey for "lands, lying north and west of the rivers *Ohio* and *Alleghany*, "and *Conewango* creek, shall vest any title, unless the grantee "has, prior to the date of such warrant, made, or caused to be "made; or shall within the space of two years next after the "date of the same, make, or cause to be made, an actual settle- "ment thereon, by clearing, &c. *Provided always, nevertheless*, "That if any such actual settler, or any grantee, in any such "original or succeeding warrant, shall by force of arms of the "enemies of the *United States*, be prevented from making such "actual settlement, or be driven therefrom, and shall persist in "his endeavours to make such actual settlement as aforesaid, "then, in either case, he and his heirs, shall be entitled to have "and to hold the said lands, in the same manner, as if the ac- "tual settlement had been made and continued."

"Persist" is the correlative of attempt or endeavour, and signifies "hold on," "persevere," &c. The beginning words of the section,

section, restrict the settlement, "to be within two years *next* 1800.
"*after* the date of the warrant, *by clearing*, &c. and *by residing*
"for the space of five years, *next following* his first settling of
"the same, if he or she shall so long live;" and in default thereof, annexes a penalty of forfeiture in a mode prescribed. But the proviso relieves against this penalty, if the grantee is prevented from making such settlement by force, &c. and shall *persist in his endeavours* to make *such* actual settlement, as aforesaid. The relief, then, as I read the words, goes merely as to the times of two years next after the date of the warrant, and five years next following the party's first settling of the same; and the proviso declares, that *persisting*, &c. shall be equivalent to a continuation of the settlement.

To be more intelligible, I paraphrase the 9th section thus:—Every warrant-holder shall cause a settlement to be made on his lands within two years next after the date of his warrant, and a residence thereon for five years next following the first settlement, on pain of forfeiture by a new warrant. Nevertheless, if he shall be interrupted, or obstructed, by external force, from doing these acts within the limited periods, and shall afterwards persevere in his efforts in a reasonable time, after the removal of such force, until those objects are accomplished, no advantage shall be taken of him, for the want of a successive continuation of his settlement.

The construction I have adopted, appears to me to restore perfect symmetry to the whole act, and to preserve its due proportions. It affords an easy answer to the ingenious question, proposed by the counsel of the *Holland* company. If, say they, immediately after a warrant issues, a settler, without delay, goes on the ground the 11th of *April* 1792, and stays there until the next day, when he is driven off by a savage enemy, after a gallant defence; and then fixes his residence as near the spot, as he can, consistently with his personal safety, does the warrantee lose all pretensions of equity? Or, suppose he has the good fortune to continue there, firmly adhering to the soil, for two or three years, during the *Indian* hostilities; but is, at length, compelled to remove by a superior force: is all to go for nothing, and must he necessarily begin again? I answer to both queries, in the negative;—by no means. The proviso supplies the chasm of successive years of residence; for every day and week he resides on the soil, he is entitled to credit in his account with the commonwealth: but, upon a return of peace, when the state of the country will admit of it, after making all reasonable allowances, he must resume the occupation of the land, and complete his actual settlement. Although a charity cannot take place according to the letter, yet it ought to be performed *cy-pres*, and the substance pursued. 2 *Vern.* 266. 2 *Fonb.* 221.

It

1800.

It has been objected, that such a contract with the state, is unreasonable, and hard on those land-holders, and ought not to be insisted upon. It will be said, in reply, they knew the terms before they engaged in the bargain, and must abide by the consequences: The only question is, whether the interpretation given of it be correct or not.

7th. A due conformity to the provisions of the act, is equally exacted of those who found their preference to lands on their personal labour, as of those who ground it on the payment of money. I know of no other distinctions between these two sets of land-holders, as to actual settlement and residence; than that the claims of the former, must be limited to a single plantation, and the labour be exerted by them, or under their direction; while the latter may purchase as many warrants as they can, and make, or cause to be made, the settlements required by law. *Addison*, 340, 341.

It is admitted, on all sides, that the terms of actual settlement and residence, are, in the first place, precedent conditions, to the vesting of absolute estates in these lands; and I cannot bring myself to believe, that they are dispensed with, by unsuccessful efforts, either in the case of warrant-holders, or actual settlers. In the latter instance, our uniform decisions have been, that a firm adherence to the soil, unless controlled by imperious circumstances, was the great criterion, which marked the preference in such cases; and I have seen no reason to alter my opinion.

8th. Lastly, it is obvious from the preamble, and section 2, that the settlement of the country, as well as the sale of the lands, was meditated by this law; the latter, however, appears to be a secondary object with the legislature. The peopling of the country, by a hardy race of men, to the most extreme frontier, was certainly the most powerful barrier against a savage enemy.

Having been thus minute, and I fear tedious, in delivering my opinion, it remains for me to say a few words, respecting those persons who have taken possession of part of these lands, supposing the warrants to be *dead*, according to the *cant word* of the day, and who, though not parties to the suit, are asserted to be implicated in our decision. If the lands are forfeited in the eye of the law, though they have been fully paid for, the breach of the condition can only be taken advantage of by the commonwealth, in a method prescribed by law. Innumerable mischiefs, and endless confusion, would ensue, from individuals taking upon themselves to judge when warrants and surveys cease to have validity, and making entries on such lands at their will and pleasure. I will repeat what we told the jury in *Morris's Lessee* v. *Neighman* and *Shaines*, "If the expressions of the law were not "as particular as we find them, we should have no difficulty in "pronouncing

"pronouncing that no person should take advantage of their own "wrong, and that it does not lie in the mouths of men, like those "we are speaking of, to say the warrants are dead; we will take "and withhold the possession, and thereby entitle ourselves to "reap benefits from an unlawful act." On the whole, I am of opinion, that the rule should be discharged. 1800.

SMITH, *Justice.* I have had a full opportunity of considering the opinion delivered by my brother YEATES; and as I perfectly concur in all its principles, I shall confine myself to a simple declaration of assent. I could not hope, indeed, to add to the argument; and I am certain I could not equal the language, which he has used on the occasion.

By the COURT: Let the rule be discharged. (24)

Jackson *et al.* *versus* Winchester.

THE following points occurred in this case:

1st. The issues in this case were joined on pleas of *non assumpsit*, and payment. When the jury were about to be impanneled, the defendant's counsel moved to strike out the former plea, by which (leaving only the affirmative plea of payment) he would be entitled to the conclusion, in addressing the jury. The plaintiff's counsel objected, with an allegation, that upon the issues, as they now stood, they had been obliged to send a commission into another state, to prove the sale and delivery of the goods, for which the action was brought.

And the COURT refused to allow the plea of *non assumpsit* to be struck off. (25)

2d. The

(24) Since this decision was pronounced, the subject has been revived and agitated in various interesting forms. In the winter of 1801—2, several petitions were presented by the intruders to the legislature, requesting their interposition, but the committee of the senate, to whom these petitions were referred, reported against them, and admitted, that the controversy belonged exclusively to the Courts of justice. But soon after this report was made, a bill was introduced, entitled "An act," &c. which recites the existing controversies, gives a legislative opinion against the claim of the warrantees, and institutes an extraordinary tribunal, to hear and decide between the parties. The appearance of this bill produced two remonstrances from the *Holland* company, but without effect. As soon as it became a law, the attorney-general and the counsel for the company were invited to a conference with the judges, on the carrying of it into effect; but, upon mature consideration, the counsel for the company declined taking any part in the business, and assigned their reasons in a letter addressed to the judges, dated the 24th of *June* 1802. An issue was then formed, by the direction of the judges, which was tried at *Sunbury*, on the 25th of *November* following, before YEATES, SMITH, and BRACKENRIDGE, *Justices*, and a report of the proceedings and decision on that occasion will be found in a subsequent part of the present volume.

(25) While this work is in the press, the same question has just occurred in the Circuit Court of the *United States*; and the Judges decided, that where the

1800.

2d. The defendant alledged, that the plaintiffs had agreed to take payment of the debt, for which the action was brought, in *Tennessee* militia certificates, if *David Allison* approved of it. *Allison* approved, in writing, of the proposed payment, and the certificates were delivered to him; but it became a question, how far that delivery was satisfaction to the plaintiffs? And *Allison* being dead, *M. Levy*, offered himself as a witness to prove, that on a question of bail, before M'KEAN, *C. J. Allison* deposed, that the plaintiffs had debited him with the amount of the certificates, in their account current. The plaintiffs' counsel objected to the evidence.

And, by the COURT: Nothing that passed before the Judge, on the question of bail, can be evidence on the trial, unless it was clearly admitted, as a fact, by the party.

W. Tilghman and *Hallowell*, for the plaintiffs.
M. Levy and *Dallas*, for the defendant.

Bussy *versus* Donaldson.

THIS was an action on the case, against *the owner* of the ship *Edward*, for running foul of, and sinking, the brig *Katy*, at the piers in the river *Delaware*, by negligence, and improvident and unskilful management, &c. The defence was made on three grounds: 1st. That the injury was occasioned by an unavoidable accident, for which no reparation ought to be exacted. 2d. That as the ship *Edward* was in the charge of a public pilot of the port, (a person not the choice, nor the voluntary agent, of the owner) when the injury was committed, the owner was not legally responsible. And, on this point, the following authorities were cited: 3 *Bac. Abr.* 591, 2. 7 *Geo.* 2. *c.* 15. 3 *State Laws*, 422. *s.* 8. 10. 15. *Wesc.* 395. *Beawes*, 122. 1 *Emirig.* 402, 3. 1 *Bl. Com.* 431, 2. 1 *Dom.* 241. *Tit.* 16. *s.* 3. *Salk.* 442. 440. 3 *Bac. Abr.* 560. 3d. That the amount of the injury actually sustained, is not the measure of damages, in the present action. 1 *Dall. Rep.* 180. *Purviance et al.* v. *Angus.*

After argument by *W. Tilghman*, *M. Levy*, and *Rawle*, for the plaintiff, and by *Ingersoll*, *E. Tilghman*, and *Lewis*, for the

the pleas were *non assumpsit*, and payment, the defendant might, of course, strike out the plea of *non assumpsit*, without applying to the Court, at any time before the jury were actually sworn. They said, it operated to relieve the plaintiff, from the necessity of proving the assumption, and was, therefore, for his advantage. But they distinguished it from the case of *adding* a plea, as essentially different; that case requiring the authority of the Court. *Vuyton* v. *Briculle*, *October* term 1806. *Dallas*, for the plaintiff. *Ingersoll* and *Du Ponceau*, for the defendant.

defendant,

defendant, the Judges delivered their opinions to the jury, in substance, as follows: 1800.

SHIPPEN, *Chief Justice.* The first object, that naturally presents itself, is to ascertain, whether the injury complained of, was the consequence of gross negligence, or of mere accident? This falls, exclusively, within the province of the jury: but, if they shall think, that the injury was the consequence of gross negligence, then the plaintiff is entitled to recover damages; unless some rule of law interposes to prevent it, under the peculiar circumstances of the present case.

In considering the point of law, we are led into a field of inquiry equally interesting for its novelty, and its importance: for, although the defendant admits, that in ordinary cases, the owner of a ship is answerable, *civiliter*, for the injuries committed, in the course of his service, by the captain and crew; it is insisted, that a pilot, under the regulations of our act of assembly, for his examination and appointment, is not to be regarded as the agent, or servant, of the owner, but rather as the officer of the public.

Though it is not agreeable to deliver opinions, on important points of law, suddenly started, in the course of a trial, I think I can safely pronounce, on the present occasion, that the distinction, which has been taken, is rather plausible, than solid. The legislative regulations were not intended to alter, or obliterate, the principles of law, by which the owner of a vessel was previously responsible, for the conduct of the pilot; but to secure, in favour of every person (strangers as well as residents) trading to our port, a class of experienced, skilful, and honest, mariners, to navigate their vessels safe up the bay and river *Delaware*. The mere right of choice, indeed, is one, but not the only, reason, why the law, in general, makes the master liable for the acts of his servant: and, in many cases, where the responsibility is allowed to exist, the servant may not, in fact, be the choice of the master. For instance: if the captain of a merchant vessel dies on the voyage, the mate becomes captain; and the owner is liable for his acts, though the owner did not hire him, originally, nor expressly chuse him to succeed the captain. The reason is plain: he is in the actual service of the owner, placed there, as it were, by the act of God. And so, in the case under consideration, the pilot was in the actual service of the owner of the ship, though placed in that service, by the provident act of the legislature. The general rule of law, then, entitles the plaintiff to recover; and we have heard of no authority, we can recollect none, that distinguishes the case of a pilot, from those numerous cases, on which the general rule is founded.

As to the assessment of damages: it is a rational, and a legal, principle, that the compensation should be equivalent to the injury. There may be some occasional departures from this principle;

1800. ciple; but I think it will be found safest to adhere to it, in all cases proper for a legal indemnification, in the shape of damages.

SMITH, *Justice.* I perfectly concur in the opinion expressed by the *Chief Justice*, upon the responsibility of the owner of a ship. But, I confess, that I am not prepared to accede to his opinion, on the assessment of damages. I take this distinction. In a case of contract; or in a case of damage by gross negligence; the jury should always, I think, give a compensation to the full amount of the injury actually sustained. But if an injury is done, in a way merely fortuitous and accidental, I think the jury have a legal and salutary discretion upon the subject.

BRACKENRIDGE, *Justice*, concurred generally in the sentiments of the *Chief Justice.*

Verdict in favour of the plaintiff for 2,500 dollars. (1).

Water's Executors *versus* M'Clellan *et al.* (2).

TRESPASS for goods of the testator, taken and sold by the sheriff, on an execution issued against *Dewees.* The principal part of the goods were claimed by the testator, under a distress and sale, which he had, also, executed against *Dewees*; but he had left the goods in *Dewees's* possession for four or five years. The charge contained the following points:

SHIPPEN, *Chief Justice.* 1st. It is incumbent on the plaintiff, to prove his property in the goods, which were taken by the sheriff; and to do this, he has produced evidence of a former distress and sale, of the same goods, for rent due from *Dewees* to him. But the defendants answer, that the distress was fraudulent; because (among other reasons) the goods were left in the possession of the debtor. In the case of a voluntary sale of goods, the law, both in *Pennsylvania* and *England*, regards the continuance of the debtor's possession, as a badge of fraud. In *England*, the law is the same, where the sale is made by the sheriff; but in *Pennsylvania* a different rule, in that case, has prevailed; and where a relation, or friend, after a fair purchase, at public sale, leaves the goods in the occupancy and use of the debtor, it never has been deemed a fraud upon creditors. As, therefore, the purchase, on the present occasion, was not by a private bill of sale; but at an open, public, vendue; the continued possession

(1) The account exhibited for the whole expense of raising and repairing the brig, amounted to 1310*l.* 8*s.* 9*d.*

(2) Tried in the Circuit Court, *West-Chester*, 29th of *May* 1800, before SHIPPEN, *Chief Justice*, and YEATES, *Justice.*

by

by *Dewees* does not, in the opinion of the Court, justify the defendant's taking and sale. (3) 1800.

2d. It has been objected, for the defendants, that the plaintiff was bound to show, that the distress was made on the premises; whereas, at least, a part of the goods appears to have been distrained elsewhere. However available this objection might have been upon a replevin, between the original parties, we do not think, that third persons can take advantage of it.

3d. It is urged, that there were a number of young cattle taken on the distress; and that as these have been fed, and reared, by the care and cost of *Dewees*, he had acquired a property in their increased value. Of the truth and operation of this allegation, the jury will consider: and, if they are of opinion, that the expense of maintaining, has exceeded a fair compensation for the use of the cattle, they will make a reasonable deduction from the plaintiff's demand.

Verdict for the plaintiff.

Morris's Lessee *versus* Neighman. (1)

EJECTMENT for land, on the north-west of the rivers *Ohio* and *Alleghany*, and *Conewango* creek.

The plaintiff claimed under a warrant, dated the 4th of *March* 1793, on which a survey was executed, of the 12th of *November* 1794; but he had made no endeavour to settle the land, till *July* 1796.

The defendant claimed as an actual settler, under a settlement commenced in the year 1796, prior to any attempt by the plaintiff; and upon a presumption, that the plaintiff had incurred an absolute forfeiture of his rights, by not making a settlement within two years, from the date of his warrant, according to the terms of the act of the 3d of *April* 1792. 3 *State Laws*, 209. *Dall. edit.*

But by the COURT, in the charge to the jury, two points were, expressly decided: 1st. That the plaintiff did not forfeit his rights, by not making a settlement within two years from the date of his warrant. It is notorious, that an *Indian* war existed from the year 1790, until general *Wayne's* treaty, which was made on the 3d of *August* 1795, and ratified on the 23d of *December* 1795. The ratification of this treaty is to be considered as the *terminus*

(3) The defendant's counsel cited the following cases on this point: 3 *Co.* 81. 2 *T. Rep.* 594, 5, 6. 1 *Wils.* 44. But see *Levy* v. *Wallis*, *ante*, *p.* 167, 8. *Chancellor* v. *Phillips*, *post*. *The United States* v. *Cunningham*, *post*.

(1) Tried at *Pittsburgh*, Circuit Court, *May* 1800, before YEATES and SMITH, *Justices*.

1800. *a quo*, a man might safely begin a settlement on the western frontier of *Pennsylvania*; and if, after that epoch, actual settlers, or grantees, persisted in their endeavours to make a settlement, they would not incur a forfeiture of the land. 2d. That even if it were a case of forfeiture, no individual could take advantage of it, by entering on the land: the advantage could only be taken by the commonwealth, whose officers might issue new warrants, in the form prescribed by the act of assembly.

Verdict, accordingly, for the plaintiff.

Ross, for the plaintiff.
Brackenridge, and *Young*, for the defendant.

Bell's Lessee *versus* Levers.

EJECTMENT, for land in *Northampton* county. The charge contained the following points:

By the COURT: 1st. A warrant, which loses its descriptive location, by a prior warrant, may be laid on any vacant land. It has been the uniform practice of the surveyors so to do; and the practice has long received the sanction of the land office. 2d. A deputy surveyor gave an order to his assistant, to execute a survey; and, before it was actually executed, he died; but it was alleged, that neither the assistant, nor the party, knew of his death, till after the execution of the survey. The truth of the allegation should be examined; but, in an old transaction, if the title depends upon it, the examination should not be very strict; and every doubt should operate in favour of the validity of the survey. 3d. This is the case of a lost *application;* and, in cases of this kind, above all others, there must be due diligence employed to designate and effectuate the claim: for, if the survey is made, in a place different from that designated in the application, the land office can have no notice of the fact, until a return is made; and it would be hard, that a subsequent purchaser without notice, and without the means of obtaining notice, when he purchases, should be affected by the claim. 4th. In the case of a warrant, neither the negligence, nor the fraud, of the public officer, shall work an injury to the party. But if the party assists in committing the fraud, not only the party himself, but every person claiming under him, or deriving title directly through him, shall be debarred from taking advantage of the transaction. 5th. If an application, made and entered in *August* 1765, is not acted upon till 1773; and a *caveat*, entered in 1775, is the first notice of a survey; the lapse of time amounts to a dereliction of the inceptive right, as the Courts of *Pennsylvania* have often decided. (1)

(1) This cause was tried in the Circuit Court, *Northampton* county, before SHIPPEN, *C. J.* and YEATES, *J.*

Beissel

1800.

Beissell *versus* Sholl. (1)
Wagoner *versus* Same.

CASE, for diverting a water course. The COURT left the facts to the jury, under this general statement of the law: "That every man, in this country, has an unquestionable right, "to erect a mill upon his own land; and to use the water, pass- "ing through his land, as he pleases: subject only to this limi- "tation, that his mill must not be so constructed and employed, "as to injure his neighbour's mill; and that, after using the "water, he returns the stream to its ancient channel."

(1) Tried in the Circuit Court, *Northampton* county, *June* 1800, before SHIPPEN, *C. J.* and YEATES, *J.*

SUPREME COURT

OF

PENNSYLVANIA.

September Term 1800.

The Commonwealth *versus* Fitch.

CERTIORARI, to remove the judgment and proceedings in a case of forcible entry and detainer, from *Luzerne* county. The inquisition stated, "That *Nathan Beach* was *possessed* in "his demesne as of fee, &c. and continued so *seised* and possessed, until the defendant did enter, and him the said *Nathan* "*Beach* thereof *disseised*," &c.

It was objected, that the prosecutor is stated to have been only *possessed* of the premises, whereas the evidence proved him to have been *seised*.

But by the COURT: There is some informality in the expressions; but, surely, stating that the prosecutor was *disseised*, necessarily implies a previous seisin.

Judgment affirmed.

Sharp *versus* Pettit.

WRIT of dower. The inquisition states, that the husband did not die seised of the premises; and finds damages for the detention of dower, with costs.

Ross moved to quash the inquisition, so far as respects the damages and costs.

By the COURT: It must be so; but let judgment be entered for the demandant, without damages, or costs.

Chancellor

1800.

Chancellor *versus* Phillips *et al.*

THE following case was submitted for the opinion of the Court:

On the 2d of *June* 1798, a levy was made by the sheriff on a kiln of unburnt bricks, and other property, by virtue of a *fi. fa.* for a debt of 149*l.* 15*s.* with interest and costs. The bricks were suffered to remain in this state till the 14th of *April* 1799, when, on advertising them for sale, it was found that one of the defendants had sold them to *Thomas Harrison*, on the 1st of *December* 1798, without giving any notice of the levy. The sheriff at the time of the levy, employed a man to call at the brick-yard, occasionally, but did not keep any person constantly there; nor does it appear that *T. Harrison* had any notice of the bricks being subject to the above execution, until about the time of advertising them for sale.

The question proposed was, whether *Harrison* was entitled, under the circumstances of this case, to hold the bricks discharged altogether from the lien of the plaintiff's execution; or must account to the sheriff for the amount of the execution, not exceeding the value of the bricks?

SMITH, *Justice.* It is useless to cite *English* authorities in this case; for, it has been repeatedly decided in our courts, that the law is not the same in *Pennsylvania.*

SHIPPEN, *Chief Justice.* There is, however, an obvious and material distinction between a levy on household furniture, and on merchandize, or goods for sale. In the former case, the Court has never allowed the plaintiff to lose the lien of a prior execution levied, because on principles of humanity he allowed the furniture to remain on the premises, in the possession of the defendant. But it would be going farther than the reason of our decisions, and might introduce collusion and fraud, if we were to authorise, or countenance, such a practice, indiscriminately, in every case.

By the COURT: We are of opinion, therefore, that the purchaser of the bricks is entitled to hold them, entirely discharged from the lien of the execution. (1)

Morgan, for the plaintiff.
Hallowell, for *Harrison.*

(1) The manuscript of this note, was read on a recent trial, involving the same question; and the Judges intimated a doubt of its accuracy. I find, however, that a difference between the law in *England* and in *Pennsylvania* upon this subject, has been repeatedly stated by the Judges of the Supreme Court, *Levy* v. *Wallis*. *Waters* v. *M'Lellan*. though the rule has been adjudged to be the same, in both countries, by the Circuit Court of the *United States*, upon full argument and deliberation. See the *United States* v. *Cunningham et al. post.*

Anonymous.

1800.

Anonymous.

CERTIORARI, to remove the proceedings in a case of forcible entry and detainer. *Ingersoll* urged the immediate hearing of the case, in order to avoid the inconvenience of a sentence of restitution, when great error existed on the record.

By the COURT: It has often been decided, that a *certiorari* does not operate as a *supersedeas*, in a proceeding under the landlord and tenant act. 1 *vol. State Laws*, 617. *Dall. edit.* But it has never been so decided, in the case of a proceeding, under the statutes against forcible entry and detainer.

Freeman *versus* Ruston.

VENDITIONI EXPONAS. A rule being obtained on the sheriff of *Philadelphia* county, to bring into Court, the money levied on this execution; another rule was, also, entered, to show cause why *Samuel Coates* should not receive out of the money, an equal dividend, or proportion, with other judgment creditors, whose judgments were entered on the same day, and who have not issued writs of *ca. sa.* And, thereupon, a case was stated for the opinion of the Court, comprising the following facts:

"On the 21st day of *March* 1796, *Samuel Coates* obtained "judgment in the Supreme Court against *Thomas Ruston*. A "writ of error was taken out by the defendant, returnable to "*July* 1797, and judgment affirmed in the High Court of Errors and Appeals; and the record being remitted, a *ca. sa.* was "sued out of the Supreme Court, returnable to *December* 1797, "on which (and other writs of *sa. sa.* issued at the suit of other "plaintiffs) the defendant was committed to gaol; and remained "in custody until the 21st day of *November* 1798, when he was "discharged from confinement, by virtue of the several acts of "assembly, for relief of insolvent debtors, for the benefit of all "of which he petitioned.

"Prior to his said discharge, the above *venditioni exponas* was "issued returnable to *September* term 1798; and on the 12th day "of *July* 1798, certain messuages, &c. were sold by the sheriff, "by virtue of the said execution, for 13,320 dollars.

"The purchasers at these sales were themselves, judgment creditors of the said *Thomas Ruston*. The sum of 11,451 dollars "was paid on account of the purchases, before the discharge of "Dr. *Ruston*; and the puschasers have retained in their hands "1869 dollars, part of the purchase monies, on account of their "own judgments; which judgments are, however, subsequent in "date

" date to that of Mr. *Coates*; but no writs of *ca. sa.* were ever " issued out thereon. 1800.

" The sheriff has paid sundry prior judgments out of the pro- " ceeds of the sales; and there remains in his hands, or within " his power, the sum of 8866 dollars and 17 cents, including the " balance of 1869 dollars, which the purchasers have retained, on " account of their judgments as aforesaid. All of which, how- " ever, for the purposes of this agreement, are considered as be- " ing in Court, and liable to such distribution, as the Court shall " direct.

" If the Court shall be of opinion, that *Samuel Coates* is enti- " tled to an equal dividend, or proportion, of the said monies, " with other creditors by judgment of the same date, who have " not issued writs of *ca. sa.*, then the rule to be made absolute, " and the parties, in case of disagreement, as to the sums and " portions, agree to appoint three men to determine their pro- " portions."

Rawle, on behalf of *Samuel Coates*, referred to the 17th and 19th sections of the act of assembly, (1) under which *Ruston* had been

(1) Sect. 17. " *And be it further enacted by the authority aforesaid*, That no " debtor, who shall obtain an order of discharge, as aforesaid, shall, at any " time thereafter, be imprisoned by reason of any judgment obtained for pay- " ment of money only, or for any debt, damages, costs, sum and sums of mo- " ney, contracted, accrued, occasioned, owing or growing due, before the " date of the said debtor's deed or assignment, but that upon every arrest " upon such judgment, or for such debt, damages, costs, sum and sums of " money, it shall and may be lawful for any judge of the court, where the " process issued, upon showing a copy of the order of discharge, certified by " the clerk of the court where the same is recorded, under seal of office, to " release and discharge the said debtor out of custody, and the said judge is " directed so to do, so that the said debtor, if arrested or detained on mesne " process, do give a warrant of attorney to appear to the action or actions on " which he is so arrested or detained, and to plead thereunto: *Provided*, That " the discharge of any debtor by virtue of this [* act] shall not acquit any " other person from any debt, sum or sums of money, or any part thereof, " but that all other persons shall be answerable for the same, in the same " manner as before the passing of this act, and all mortgages, judgments and " executions, whereby the goods and chattels, lands and tenements of the said " debtor shall be bound, shall remain good and effectual in law, and shall be " first satisfied out of the debtor's estate, according to their priority of lien, in " the same manner as if this act had never been passed."

Sect. 19. " *And be it further enacted by the authority aforesaid*, That notwith- " standing the discharge of any debtor, by virtue of this act, all and every " debt or debts, due and owing from such debtor, and all and every judgment " and judgments had and taken against him, shall stand and be good and ef- " fectual in law, to all intents and purposes, against the lands, tenements, he- " reditaments, goods and chattels of such debtor, which he, or any other per- " son or persons in trust for him, at the time of his assignment, hath or have, " or at any time thereafter shall or may be any ways seised or possessed of, in- " terested in, or entitled to, in law or equity, except the necessary wearing " apparel and bedding for himself and his family; and if he be a mechanic or

* The word [act] is omitted in the original law.

" manufacturer,

1800. been discharged, as an insolvent debtor. 4 *State Laws*, 274; and contended, that by the force of the terms there used, the judgment continued a lien, upon the debtor's discharge, notwithstanding a *ca. sa.* had been previously issued. Indeed, a judgment is constituted a lien by the constitution and laws of *Pennsylvania*, in the nature of a mortgage; and it must ultimately be satisfied out of the real estate, without regard to the process, either against person, or goods, to which a plaintiff may first resort. 1 *State Laws*, 262. The law in *England* is different. There a *ca. sa.* was considered so complete a satisfaction, that if the debtor died in prison, the creditor had lost all remedy, till the statute of 21 *Jac.* 1. *c.* 24. was enacted to afford him relief. But there are sufficient reasons, for the difference. In *England*, real estate cannot be sold, for the payment of debts, as it may in *Pennsylvania*. In *England*, too, the insolvent acts are gratuitous, and occasional; temporary in duration, and restricted in objects; but in *Pennsylvania*, they are constitutionally ordained; permanent, and universal. *Const. art.* 9. *s.* 16.

W. Tilghman, for the assignees of *Ruston*, contended, that *Coates* had lost the lien of his judgment, by issuing a *ca. sa.* That a *ca. sa.* amounts to a legal satisfaction of the debt, is the settled law of *England*; and there is no reason to depart from it here. 5 *Co. Rep.* 86. *Bloomfield's* case. *Hob.* 56—62. Nor can the terms, or the principles, of the insolvent law affect the case. The sheriff's sale was made on the 12th of *July* 1798, and *Ruston* was not discharged, until the 21st of *November* following; before which, the greater part of the purchase money had been actually paid to the sheriff. The state of the fact and the law, when the property was sold, and the price received, must govern the decision, not matter arising *ex post facto*. And the act of assembly, when it provides, for the distribution of the lands of the debtor, at the time of his discharge, can never be fairly construed, retrospectively, to unravel, revise, and cancel sales, and payments, and distributions, all regular at the time that they occurred. It is true, that the 17th section of the act continues in force all judgments, by which the debtor was bound, at the time of his discharge; but if the *ca. sa.* against the person, extinguished the lien upon the estate (which is the very point to be decided) then *Ruston* was not bound by *Coates's* judgment, at the time of his discharge; and such is the necessary exposition of the law, when

" manufacturer, his tools, not exceeding in value the sum of fifty dollars; and " it shall and may be lawful for any of his creditors, or his or their executors " or administrators, to take out a new execution against the lands, tenements, " hereditaments, goods and chattels of such debtor, except as before excepted, " for the satisfaction of their debts respectively, in the same manner and form " as they might have done, if the said debtor had never been taken in execu- " tion, any act, statute, law or custom, to the contrary notwithstanding."

the

the 17th and 19th sections are considered together, as to the fund, the existing fund at the time of discharge, which is to be distributed among the creditors. The adverse doctrine, would give the execution creditor two remedies, contrary to the principles of the common law: it would open a door for collusion between the debtor, and his *ca. sa.* creditor: and it would involve the relative rights of creditors, in endless perplexity and uncertainty, whenever an insolvency of a debtor happened, or even the prospect of it was in view. 1800.

By the COURT: The case appears so clear to us, that we do not wish another moment for consideration. The law is settled in *England*, that a *ca. sa.* operates as a satisfaction of the debt; as an extinguishment of the lien of the judgment. We have no other rule prescribed to us in *Pennsylvania*; nor can we conceive that there would be any policy, or justice, in departing from it. *Ruston* was in actual custody, upon *Coates's ca. sa.* when the land was sold. He had no lien, no claim, to the proceeds of the sale, at that time; and we can perceive nothing, in the fact, or the law, of the case, which has since revived his old right, or given him a new one, to the land itself, or to any part of the purchase money.

The rule must, therefore, be discharged.

SUPREME COURT

OF

PENNSYLVANIA.

December Term 1800.

Hepburn's Lessee *versus* Levy. (1)

EJECTMENT, for land in *Lycoming* county. In the charge to the jury, it was ruled,

By the COURT: In the case of a lost warrant, it may be removed to other land, provided the removal affects no previous right; and if it is actually surveyed upon vacant land, returned into the land office, and there accepted, it becomes an appropriation. If, however, any warrant issued, appropriating the land, before an actual survey upon the removed warrant, the right of such warrant must be preferred. The fact to be decided in the present case, therefore, is, whether any warrant, particularly describing the land in question, was delivered by the defendant to the deputy surveyor, before the survey was made for the plaintiff? A vague, undescriptive, warrant, will not be sufficient to affect the plaintiff's survey: and, although fraud is said to vitiate every transaction; yet, the fraud of the deputy surveyor cannot affect the rights of the defendant.

The Lessee of Weitzell *et al. versus* Fry.

EJECTMENT for 306 acres of land in *Northumberland* county. The case was this: On the 13th of *September* 1774, *John Read*, being seised in fee, mortgaged the premises, mentioned in the declaration, to "The trustees of the general loan "office of the province of *Pennsylvania*," incorporated under the act of the 26th of *February* 1773. 1 *State Laws*, 644. *Dall.*

(1) Tried in the Circuit Court, *Lycoming* county, on the 24th *Oct.* 1800, before SHIPPEN, *C. J.*, and BRACKENRIDGE, *J.*

edit.

edit. After various successive modifications of this trust, (1) the powers and duties of the trustees were transferred to, and vested in, the treasurer of the state, by an act of the 1st of *April* 1790. 2 *State Laws*, 792. *s.* 9. (2) The sheriff of the county, in his evidence on the trial, stated, "that he had received a precept, dated in *September* 1792, for selling the lands, under *Reed's* mortgage, from the office of Mr. *Febeiger*, the state treasurer; that the precept, he believed, was signed by Mr. *Febeiger*, and attested by Mr. *Ingersoll*, the attorney-general; that he delivered the precept to Mr. *Febeiger's* clerk (who, it appeared, had left the country) indorsed, he believed, (though he was not positive) with a written return, as it was his practice to make such indorsements; that he thought he had put up printed advertisements of the time and place of sale; and that he made the sale on the premises." It was proved, however, that, on a strict search of the loan office papers, no precept, in the present case, could be found, except one, which had no date, and which was not signed by Mr. *Febeiger*. And an advertisement of the sale, to be made on the 11th of *December* 1792, was read from the *Sunbury*, and *Northumberland*, gazettes, dated the 6th of *October* preceding. At the sale, *Thomas Reese* became the purchaser, to whom the sheriff made a deed, on the 22d of *February* 1793, for the consideration of 189*l.* 7*s.* 6*d.* and, on the 20th of *March* 1793, *Reese* conveyed to the lessors of the plaintiff, for the consideration of 160*l.* But, it was alleged by the defendants, and evidence was given tending to show, that *Reese* had been collusively employed by *Richeson*, one of the lessors of the plaintiff (the others being totally ignorant of this part of the transaction) to make the purchase for him, while, at the time of the sale, he set up a title to the premises, producing a deed from the county commissioners, dated the 26th of *November* 1792, when the land had been sold for taxes; menacing any purchaser with a law suit; and, in fact, prevented several persons from bidding, who had attended for that purpose; and some of whom avowed, that they would give 350*l.* for only 200 acres of the land. 1800.

On these facts, the defendant contended, 1st. That the authority of the state treasurer, was a special authority, and ought to be strictly pursued: whereas there was no official precept, as required by the act, to justify the sheriff's sale; nor any proof of advertisements put up at public places. 2d. That the fraud committed by *Richeson* at the time of sale, vitiated the whole proceedings; particularly, when connected with the inadequacy

(1) See the note (*k*) subjoined to the act above cited. 1 *vol.* 644.

(2) By an act of the 11th of *April* 1793, a grant was made to the *Pennsylvania* hospital, payable out of the money due to the loan office; and the managers of the hospital were constituted trustees, for the purpose of collection. 3 *State Laws*, 379. *Dall. edit.*

of

1800. of the price. *Cowp.* 26. *Hal. Hist. Com. Law*, 49. *Cowp.* 434. 2 *Pow. Cont.* 144. 163. 1 *Br. Chan.* 163.

The plaintiffs answered, that the weight of the evidence was in favour of the regular advertisement of the sale; that the blank precept, now produced, could not have been the precept, under which the sheriff acted, as he swears that his precept was signed by the treasurer, and attested by the attorney-general; that the loss of the precept being evident, its existence and regularity are legally proved by the sheriff; that it might, perhaps, be contended, that the production of a written precept was not indispensable in this case; 1 *Ld. Raym.* 166. 5 *Mod.* 387. 2 *Salk.* 467. that *Richeson* was bound to give notice of the commissioners' deed, whatever effect it produced on the sale; that this was the only ground to impeach the sale; and that fraud ought not to be presumed.

SHIPPEN, *Chief Justice.* There are two points of inquiry before the Court and jury: 1st. Whether the proceedings upon the sale have been regular? 2d. Was there such an act of fraud, unfairness, or contrivance, at the time of the sale, as ought to vitiate the whole transaction?

1st. It is alleged, on the first point, that there was no precept authorising the sale; and it is proved, that, on search, a regular precept has not been found in the treasurer's office. We think, that a precept was necessary to support the sale; and that the paper, which has been produced, was not a regular precept. But, on the other hand, the sheriff swears, that he received a precept signed by the treasurer; and it is not probable, that he would have sold an estate under a blank form. As, therefore, the party has not the custody of the precept, and ought not to be made responsible for its loss; the jury will consider, whether there is not sufficient evidence, to presume the existence of a regular precept, at the time of the sale.

It has, also, been urged, that there is no proof, that advertisements of the sale were posted up at public places; but, if the sale was a fair one, we regard this, as a very feeble objection. The act of making such advertisements, is the duty of the sheriff; it is a matter merely directory; and, unless an actual injury has been sustained by an omission, it would be hard, indeed, that it should affect the title of a *bonâ fide* purchaser.

2d. The chief ground of defence, however, is the allegation of fraud at the sale; and if *Richeson* did then attempt to get the land unfairly, he ought not to be allowed to benefit by his iniquity. It is always a mark, *prima facie*, of unfairness, when a man, who forbids a sale, or slanders a title, becomes himself the purchaser of the land. It is true, that *Richeson* might be bound to give notice of the commissioners' deed; but did he confine himself to giving a fair notice of the claim, without any sinister design,

sign, or conversation, or action, to depreciate the estate, and to secure it for himself at an undervalue? No: he employed another person, secretly, to bid for him, while he deceitfully threatened his own bidder, and seriously threatened every other bidder, with a law suit. And, wherever there is an appearance of fraud, the inadequacy of price, though not conclusive in itself to avoid a sale, affords an argument of great weight against a purchaser, to whom the fraud is imputed. 1800.

Here, then, it is important to remark, that from the special nature of the proceeding under the treasurer's precept, the defendant had no opportunity of applying to any Court, for immediate relief: but we do not hesitate to declare, that if a case were brought before us, under such circumstances, we should certainly set aside the sale.

It now, however, becomes the province of the jury to decide upon the evidence, whether *Richeson's* conduct was fair and proper; without a sinister view to get the land at an under price. If they think it was, the verdict will be in his favour. If they think otherwise, the defendant must prevail.

Verdict for the defendant. (1)

M'Laughlin's Lessee *versus* Dawson. (2)

EJECTMENT for 400 acres of land, lying north-west of the river *Ohio*. Both parties claimed under settlement rights. The defendant's improvement commenced one day earlier than the plaintiff's; but the plaintiff had the first warrant; and he had been constantly resident on the land, except when he left it, through imminent danger from the *Indians*. The defendant's improvements were greater than those of the plaintiff, (for, he was a richer man) but he was often absent from the premises, sometimes as a volunteer in the public service, and sometimes living, at a distance, with his father, or brothers.

The COURT, in the charge to the jury, strongly preferred the claim of the plaintiff, on account of his constant residence on the premises; except when obliged to retire, from a reasonable apprehension of danger. They mentioned the case of *Ewalt's Lessee* v. *Highlands*, (*ante*, *p.* 162.) and said, that the maturest reflection satisfied them of the propriety and correctness of the principle there laid down: to wit; that to constitute a legal settlement, it must be accompanied with personal residence, unless

(1) Tried in the Circuit Court, *Northumberland* county, on the 17th of *Oct.* 1800, before SHIPPEN, *C. J.*, and BRACKENRIDGE, *J.*

(2) Tried at *Pittsburgh*, *Nisi Prius*, *October* 1800, before YEATES and SMITH, *Justices*.

such

1800. such danger exists, as would operate on the mind of a man of reasonable firmness.

Verdict, accordingly, for the plaintiff.

Woods, for the plaintiff.
Ross, for the defendant.

Pollock *versus* Hall.
Same *versus* Same.

THESE causes were referred, on the 22d of *January* 1800, by agreement of the parties, and several meetings were held by the referees, at which the parties exhibited their respective proofs, and were heard by themselves or their agents. The plaintiff conceiving, however, that he had more evidence, which might be produced at a future period, or conjecturing, that the referees were unfavourable to his claims, ordered the actions to be discontinued, on the 21st of *April* 1800, and gave notice of the discontinuance to the defendant. But the referees proceeded to decide upon the matters referred; and, on the 10th of *May* 1800, filed a report, finding for the defendant the sum of 2,300 dollars. To this report exceptions were exhibited, alleging, among other objections to a confirmation, that the actions were discontinued. It became, therefore, a leading question, whether, under the circumstances stated, the plaintiff had a right to discontinue?

Dallas argued in the affirmative: 1st. That a plaintiff has a right to discontinue his action, at any time before the merits are judicially decided. It is true, that the *English* authorities say it must be done by leave of the Court; but before, or after, declaration filed; after demurrer joined and entered; after verdict on a writ of inquiry; and even after a special verdict; the leave of the Court is granted as matter of course. *Sherd. Pr.* 534, 5. *Barn.* 170. 6 *T. Rep.* 616. *Cro. J.* 35. 1 *Salk.* 178. *Gilb.* 272. 7 *T. Rep.* 6. *Barn.* 169. *Carth.* 87. 2d. That the case of a trial by jury, and the case of a reference, do not, in this respect, differ. The act of assembly places a report of referees on the same footing as a verdict; and does not affect, in any manner, the power of the plaintiff over his suit. 3d. That the practice of *Pennsylvania*, both on general principles, and under the statute, has been uniform, in favour of the plaintiff's right. A discontinuance, indeed, no more requires the act of the Court, than a *non pros*, when the plaintiff prevents a verdict, though he could not prevent a trial. The records of the Court will establish the right of discontinuance, before and after issue joined, by the mere act of the plaintiff: *Lloyd's Lessee* v. *Taylor. Sept. T.* 1764. *Plym's Lessee*

Lessee v. *Skillenbergen. Sept. T.* 1765. *Chew* v. *Jones, Sept. T.* 1767. *Kerston* v. *Yeager. Sept. T.* 1766. *Neave* v. *Forbes. Sept. T.* 1771. So after reference. *Davis* v. *Porteer. Sept. T.* 1798. *Foulk's Lessee* v. *Rennicks. Sept. T.* 1767. So after judgment, plaintiff may open the judgment, and discontinue. *Pringle* v. *Vaughan. Dec. T.* 1797. So after special verdict. *Leech's Lessee* v. *Armitage. Sept. T.* 1773. (1) So even after a report of referees actually filed. *Sterret* v. *Chambers et al. Sept. T.* 1757. (2) 1800.

W. Tilghman and *Morgan* argued against the right to discontinue. 1st. That, on general practice, there could be no discontinuance, without leave of the Court, which would only be granted on payment of costs. 2d. That after a jury was sworn, the plaintiff could not discontinue, though he might suffer a *non pros*, which had consequences differing from those of a discontinuance. 3d. That the statute reference was of a peculiar character; which implied the agreement of the parties to receive the report of the referees; and which, by the operation of a set-off, frequently converted the defendant into the real plaintiff, with the remedy of a *scire facias*. In the course of the argument they cited *Styles*, 198, 199. *Cas. Temp. Hard.* 200. *Gilb. C. P.* 219. *Crom. Pr.* 119. *Carth.* 87. 2 *Bl. Rep.* 815. 1 *Dall. Rep.* 430. 143. 355. 514.

By the COURT: The case of *Sterret* v. *Chambers et al.* induced us to pause, before we decided the point now submitted to our consideration. It does not appear, however, that the right to discontinue was at all contested in that case; and the other cases, cited from our records, do not import any judicial decision, that would be binding upon us, as authority, on the present occasion.

In this situation, we think we are at liberty to deny the right for which the plaintiff contends; and that the policy of the legis-

(1) The special verdict was found on the 21st of *April* 1775, and on the 22d of *April*, "the plaintiff by Mr. *Reed*, his counsel, discontinues the action."

(2) The following is the docket entry in this case:

September 1757.

Ross. *James Sterret* v. *James Chambers, Nathaniel Smith,* and *Elizabeth* his wife, *Randle Chambers, William Chambers, Jean Chambers, Mary Chambers, John Chambers,* and *Margaret Chambers.* *Chew, Dick. Gal.*

At a Court of *Nisi Prius*, held at *Carlisle*, the 18th day of *May* 1768. By order of Court and consent of parties, the matters in variance between them are referred to the final determination of *James Galbraith, John Byers, James Maxwell, Johathan Hogge,* and *John Montgomery*, or any three of them, who are to make report to the Supreme Court in next *September*. Rule, that the referees proceed *ex parte* on twelve days notice.

21st *September* 1768. Report of referees returned into the office, finding that the plaintiff hath no cause of action against the defendants.

24th *September* 1768. Before the sitting of the Court, plaintiff came into the office, and discontinued his action.

latture,

1800. lature, as well as the principles of justice, will sanction the denial. The act of assembly sought to compose strifes, to shorten litigation, by assigning an amicable tribunal, to which the parties might voluntarily resort: and when both have agreed to resort to that tribunal, it would be inconsistent with the general nature of an agreement, to permit one of them alone to withdraw from its jurisdiction. Feuds would be inflamed, instead of being allayed; and suits multiplied, instead of being diminished, by such a construction of the law. There may be cases, however, in which a plaintiff alleging surprise, or mistake, would be allowed by the Court to discontinue his suit: but after an agreement to refer, a disclosure and hearing before the referees, and an opinion expressed, or intimated, by them, upon the merits, a discontinuance cannot be regarded as a matter of right, and would only be permitted upon very cogent reasons, such, perhaps, as would invalidate the report itself. In the present case, we are of opinion, that the plaintiff had not a right to discontinue the suits; and that no sufficient reason appears, for allowing a discontinuance upon the authority of the Court.

On the discussion of other exceptions to the report (one of which was, that a single report was made, though two suits were referred) it was agreed to consolidate the actions, and to refer the disputed points again to the same referees.

Mather *versus* Pratt *et al.*

THIS was an action brought by the plaintiff, as indorsee and holder of several promissory notes, drawn by *Dorey* and *Bayhir*, in favour of *Joseph Mussi*, against the defendants, to whom *Dorey* and *Bayhir* had assigned all their estate, in trust for the payment, *pro rata*, of such of their creditors, as should, within a certain period, execute a general release; and the dividend of the non-assenting creditors was to be paid to them. The plaintiff had not executed the release; and, it was objected, that he could not sue the trustees, even for a dividend, in his own name, without performing the condition precedent.

The COURT were unanimously, and clearly, of this opinion, and the plaintiff suffered a non-suit. (1)

M. Levy, for the plaintiff.
Dallas, for the defendant.

(1) After this non-suit, the plaintiff issued a foreign attachment against *Dorey* and *Bayhir*, and attached the dividend in the hands of the defendants; which was, eventually, recovered.

SUPREME COURT

OF

PENNSYLVANIA.

March Term 1801.

Commonwealth *versus* Addison.

THE attorney-general made a motion, for a rule to show cause, why an Information should not be granted against the defendant, the President of the Courts of Common Pleas, in the fifth circuit; on the affidavit of *J. C. Lucas*, an associate Judge of the Court of Common Pleas of *Alleghany* county, stating that he had been wilfully prevented by Mr. *Addison*, from delivering his sentiments to the grand jury, after Mr. *Addison*, as President, had concluded his charge, &c.

In support of the motion, the attorney-general cited 1 *Reeves. Hist. Eng. Law*, 201. *c.* 4. 2 *Ibid.* 2. *Jacob's L. Dict. tit.* "*Chapitre.*" 4 *Bl. Com.* 303. *Const. Penn. art.* 5. *s.* 4. 6 *Mod.* 96.

But, by the COURT: We are, unanimously, of opinion, that the case does not present to our consideration an indictable offence; and, of course, it is not a case, in which an information ought to be granted. But we are (with the same unanimity) of opinion, that every Judge has a right, and, emphatically, that it is his duty, to deliver his sentiments upon every subject that occurs in Court. We add, so far as the expression of our sense of decorum may have weight, that we think, it would be indecent and improper, in any presiding Judge, to attempt to prevent his associates from the exercise of this right; from the performance of this duty.

Motion refused.

1801.

Wainwright *et al.* *versus* Crawford.

THIS was an action on the case, brought by foreign merchants, against the defendant, to recover the amount of money lent to the captain, to pay for disbursements in repairing, and supplying, his ship, in a foreign port. It was proved, by the evidence of the captain, that he had no funds belonging to his owner, or to himself; and that he borrowed the money from the plaintiffs, to make the necessary repairs of the ship, for the prosecution of her voyage.

Moylan, for the defendant, observed, that the power of the master of a ship, extended no farther, than to authorise him to hypothecate the ship herself, in a foreign port, for absolute necessaries: but, he contended, that the master could not, under any circumstances, *personally* bind the owners. *Moll. c.* 1. 6. 2. *s.* 10. *s.* 14. *Beawe's L. M.* 95. 6. 1 *T. Rep.* 2 *Dall. Rep.* 195. 1 *Salk.* 35. 2 *Ld. Raym.* 984.

Ingersoll and *Franklin*, for the plaintiffs, insisted, that every person who supplied a ship had a triple security; to wit, the master, the owner, and the ship; that, by the maritime law, the master was the authorised agent of the owners, in foreign ports; and that, independent of his power to bind the ship herself, he might bind the owners personally, upon proof that the money, or supplies, went to their use. *Cowp.* 636. 1 *Vez.* 443. 1 *T. Rep.* 73. 2 *Vern.* 643. 14 *Vin. Abr.* 300. *pl.* 9.

SHIPPEN, *Chief Justice.* If the jury are satisfied (and the evidence is strong upon the point) that there was an actual necessity for borrowing the money, to repair the ship, the plaintiffs ought to recover. The lender is bound, it is true, to make due inquiry, whether the repairs are necessary; and whether the captain has effects in his hands, sufficient to defray the expense of repairing, without resorting to a loan: but he is not bound to know, nor to inquire, what is the state of the accounts, between the owner and the captain. If, therefore, the case of necessity existed; and the plaintiffs did not know (for, we fix on their knowledge as the test) that the captain had sufficient funds, in possession, to relieve the necessity; we think that the contract of the captain will bind his owners, *personally.*

Verdict, accordingly, for the plaintiffs.

SUPREME COURT

OF

PENNSYLVANIA.

September Term 1801.

Austyn *versus* M'Lure.

CASE, on a special *assumpsit*. The declaration contained three counts, of each of which the following is the substance.

1*st Count.* After stating that a controversy subsisted between the plaintiff, and one *Rowson* (a *British* merchant for whom the defendant was agent) that they had agreed to enter an amicable action and reference, in the Federal Circuit Court, and that the referees met on the 12th of *January* 1798; the declaration proceeds, that at the said meeting "it was agreed between *M'Lure* "and *Austyn*, that in consideration that the said *Austyn* would "waive all objections to the referees proceeding to arbitrate be- "tween the said *Rowson* and *Austyn*, and *would* submit the mat- "ters in controversy between them to the said referees: as also "in consideration of the said *Austyn's* having promised, *on de-* "*mand thereof made*, to give security to pay to the said *M'Lure* "whatever sum the said referees might award to be paid to the "said *Rowson*, should the said referees decide the said contro- "versy and dispute against the said *Austyn*, he the said *M'Lure* "undertook, &c. that he would well and truly pay the said *Aus-* "*tyn* whatever sum of money the said referees might award to "be due from the said *Rowson* to the said *Austyn*." And the declaration then avers, "that *Austyn* did waive all objections, &c. "and always was ready to give to the said *M'Lure* the said se- "curity above mentioned, when he should be required by the "said *M'Lure*. And that the referees awarded a balance of "$1454\frac{6}{100}$ dollars to be due from *Rowson* to *Austyn*, &c."

2*d Count.* After stating the agreement to arbitrate between *Rowson* and *Austyn*, the declaration proceeds, that "in conside- "ration that the said *Austyn* had at the request of the said "*M'Lure*

1801. "*M'Lure* promised and undertook, when he should be thereunto "required by the said *M'Lure*, to procure good and sufficient "security for the performance of the award, which should be given "by the said arbitrators, and for the payment of the sum which "might be awarded against the said *Austyn*, the said *M'Lure* "did on his part undertake, &c. to the said *Austyn*, to perform "the said award on the part of the said *Rowson*, if it should be "given against the said *Rowson* by the said arbitrators, and to "pay to the said *Austyn*, when thereto lawfully required, "whatever sum of money might be awarded to be due from the "said *Rowson* to the said *Austyn*, &c." The declaration then makes an averment of the award as before; and "that the said "*Austyn* was always ready and prepared well, &c. to perform "his said promise and undertaking, and to give good and suffi- "cient security, when he should be thereto required, by the "said *M'Lure*, &c."

3d Count. After stating the same agreement to arbitrate, the declaration proceeds, "that in consideration that the said *Austyn* "would not object to the said referees proceeding to hear and "determine the disputes and controversies aforesaid without de- "lay, and in consideration that the said referees would so proceed "without delay, the said *M'Lure* promised, &c. that he would "perform the award of the referees, &c." The declaration then avers, "that *Austyn* did not object, &c. that the arbitrators "proceeded without delay, &c. and made their award, &c."

On the evidence, it appeared, that after the referees had met, more than once, *Austyn* (whose circumstances were considerably embarrassed) observed, "that he wished to understand, in what "situation he would be placed, if the award should be against "*Rowson*; for, if it went against him, he was present to answer "the demand; or, should he be thought insufficient, he was ready "to produce satisfactory security to answer it." *M'Lure* replied, "that he was *Rowson's* agent, and stood in *Rowson's* place, or "stead." The referees understood, that *Austyn's* offer of security was meant, "if it should be required by *M'Lure*," who did not ask it, though he never waived it: and that *M'Lure's* declaration was meant, "that he would himself be answerable in case the "award was against *Rowson*." The referees proceeded to hear and decide upon the case; and nothing further past between the parties on the subject of security. *Austyn*, however, it appeared, had applied to Mr. *Gallaudet* to be his surety, at some time, in 1797, or 1798, (the witness could not recollect when, nor what passed upon the occasion) and Mr. *Gallaudet*, having then funds of *Austyn's* in his hands, said, "that he would have become the surety, if it had been then further requested."

On these facts, the plaintiff's counsel (*Ingersoll*, *Hallowell*, and *Todd*) contended, that the special assumption of the defendant was

was proved; and that there was a good legal and equitable consideration to sustain it. In the course of the argument, they cited the following authorities. *Cro. E.* 543. 703. 1 *Com. Dig.* 199. 5 *Mod.* 411, 412. *Cro. E.* 67. 70. 3 *Burr.* 1666. 1 *Com. Dig.* 200. 1 *Bac. Abr.* 267. *Com. Rep.* 99. 12 *Mod.* 457. 1 *Pow. Cont.* 344. 1801.

The defendant's counsel (*Dallas*) contended, that whatever might be the impressions, or inferences, of the referees, the declaration of *M'Lure* did not, in itself, amount to an express *assumpsit;* that it was not a case, in which an implied *assumpsit* could be raised; that, at most, it was a mere gratuitous undertaking without any possible consideration, beneficial to *M'Lure*; a *nudum pactum*, on which no action could be maintained; and that the consideration was not proved by the evidence, as it was laid in the declaration. 2 *Bl. Com.* 445. 3 *Bl. Com.* 159. *Bull. N. P.* 147. *Bulstr.* 120. *Dyer*, 272. 2 *Burr.* 1666. *Cro. E.* 79. 2 *Burr.* 1671.

The COURT delivered a charge to the jury, in which they stated, that the smallest spark of benefit, or accommodation, was sufficient to create a valid consideration for a promise; and intimated that their opinion was decidedly in favour of the plaintiff. (1)

Verdict, accordingly, for the plaintiff.

The Commonwealth *versus* Dallas, Attorney of the United States, &c.

QUO Warranto. The President having honoured the defendant with an appointment, as attorney of the *United States*, for the Eastern district of *Pennsylvania*; and the Governor having been pleased, also, to appoint him Recorder of the City of *Philadelphia*; it was thought, by some of the members of the Select and Common Councils, that the tenure of these offices, by the same person, at the same time, was constitutionally incompatible. And, in order to try the question, Mr. *Hopkinson*, the solicitor of the corporation, was instructed to move the Supreme Court, for leave to file an information, (on the relation of the Select and Common Councils) (2) in nature of a writ of *quo warranto*, to inquire by what authority the defendant exercised the office of Re-

(1) BRACKENRIDGE, *Justice*, seemed to dissent from the opinion of the Court, with this remark: "The *English* books say, that there must be a spark of consideration (though a single spark is enough) to maintain an action upon a promise: but, in this case, the Court have blown out the spark; and I cannot perceive, whence they get light sufficient to enable them to decide for the plaintiff."

(2) The Court declared, that upon a proceeding of this kind, it was necessary to name the relator, at whose instance it was instituted.

corder.

1801. corder. It was agreed, that the merits of the case should be discussed and decided upon this preliminary motion, in order to avoid any public inconvenience; as the defendant declared his determination not to act as Recorder, while a doubt rested upon his right.

The case turned, principally, on the construction of the 8th section of the 2d article, of the constitution of *Pennsylvania*; which is expressed in these words: "No member of congress "from this state, *nor any person holding, or exercising, any office* "*of trust or profit under the United States*, shall, at the same "time, hold or exercise the office of *judge*, secretary, treasurer, "prothonotary, register of wills, recorder of deeds, sheriff, or "any office in this state, to which a salary is by law annexed, or "any other office which future legislatures shall declare incom- "patible with offices or appointments under the *United States*."

The argument was conducted, with great and equal ability and candour, by Messrs. *Hopkinson*, *E. Tilghman*, and *Lewis*, in support of the motion; and by Messrs. *Ingersoll* and *M'Kean*, against it.

In support of the motion, it was stated, as a foundation, that the Recorder of the city of *Philadelphia* is *a Judge;* and, consequently, within the clause of the constitution, which excludes an officer of the *United States*, from holding, or exercising, the office of a judge, in this state. It was said, that the policy of the exclusion, originated in a jealousy, lest the federal government, should overshadow the state governments; and, if there was a doubt upon the subject, *that* policy required a decision, affirming the incompatibility of the offices in question. The commission, duties, and powers, of the Recorder were then analysed, with a view to prove that his office was of a judicial character; particularly when he acted as the organ of the mayor's court; and that it was not the name (as a recorder, a justice, &c.) but the duty, which constituted a *Judge*. 2 *State Laws*, 658. *s.* 14. *Ibid.* 660. *s.* 19, 20. *Ibid.* 662. *s.* 22. *Const. Penn. art.* 5. *s.* 1. 4 *State Laws*, 75. Nor, it was insisted, did he merely perform his judicial functions as a ministerial agent of the corporation; but he was, in fact and in law, a judge within the meaning of the constitution, and the interpretation of the most authoritative writers. *Con. Law Dict.* "*Judge.*" *Johnson's Dict.* "*Real.*" *Jac. L. Dict.* "*Judge.*" 1 *Bl. Com.* 269. 4 *vol.* 84. 125. 1 *Bac. Abr.* 3 *Bl. Com. in App.* 3. 38—40. 4 *Inst.* 73. 23. 6 *Co.* 20. 9 *Co.* 118. 1 *H. Hist. P. C.* 231. *Cro. C.* 146. 1 *Bl. C.* 269. 12 *W.* 3. 1 *Geo.* 3. 1 *Tidd.* 426. *Min. of Conv.* 81. 85. 138, 139. 194. 198.

In opposition to the motion, it was premised, that further than the constitution has prescribed, a spirit of jealousy, between the federal and state governments, ought not to be encouraged: and the

the argument was pursued upon the following general propositions: 1st. That the 8th section of the 2d article of the constitution, does not include in its prohibition, any other than the *state officers*. 2dly. That the Recorder of the city of *Philadelphia* is not *an officer of the commonwealth*, or state; but an officer of the corporation. 3dly. That the Recorder, according to the letter, the spirit, and the meaning, of the constitution, is not *a judge*. The following books were cited on these several propositions: *Min. Coun. Cens.* 139, 140, 141, 142. 2 *State Laws*, 546. 334. 565. 634. 636. 658. *Const. Penn.* 1776. *ch.* 2. *s.* 9. 2 *State Laws*, 654. *s.* 1. *s.* 14. 4 *Bl. Com.* 84, 5. 126. *Cro. C.* 373. 1 *Hale. P. C.* 58. 440. 1 *H. P. C.* 231. 9 *Co.* 118. *b.* 2 *T. Rep.* 87. *Cro. C.* 138. *Sir W. Jones*, 193. *Cro. E.* 76. 3 *Burr.* 1615, 1616. 1 *Sid.* 305. *Doug.* 382. 2 *T. Rep.* 88. *Priv. Lond.* 16. 23. 25. 63, 64. 1 *Kyd*, 426. 2 *Kyd*, 80. 82, 83. 1 *Bl. C.* 76. 3 *Bl. C.* 334. 60. 6 *Co.* 20. *Cro. C.* 146. 9 *Co.* 1186. *Stra.* 1103. 1 *Burr.* 542. 12 & 13 *W.* 3. *c.* 2. *s.* 3. 1 *Geo.* 3. *c.* 23. *Min. Conv.* 39. 63. 78. 82. 126. 138. 1801.

The argument was, unavoidably, protracted till late in the last day of the term; and the Judges, declaring that the question was of too much importance to be decided without deliberation, directed a *curia advisare vult* till the next term; when the unanimous opinion of the Court, was delivered by

SHIPPEN, *Chief Justice*: That although the Recorder of the city of *Philadelphia* possesses some powers, and performs some duties, of a judicial nature, he is not a judge, within the terms, spirit, and meaning, of the 8th section of the 2d article of the constitution.

The motion, for leave to file an information, in the nature of a *quo warranto*, was, therefore, refused.

SUPREME COURT

OF

PENNSYLVANIA.

March Term 1802.

Falconer *versus* Montgomery *et al.*

THIS was a *replevin* for fifteen hogsheads of rum; and the matters in dispute were referred to *James Currie*, and *David Winchester*, with power to chuse an umpire, if they disagreed. The two referees met, by consent of parties, in *Baltimore*; and both sides were fully heard; the evidence being all in writing, and no part of it rejected. It appeared, however, that the plaintiff objected to the consideration and decision of any other matter, than the claim to the rum, for which the replevin was brought; while the defendants insisted upon an investigation of all the commercial transactions between the parties. The referees divided in opinion upon these propositions; and appointing *Joseph Williams*, as an umpire, they stated to him (in the absence of the parties) the facts, as they had previously appeared to them. The umpire then examined the accounts produced to him (the parties being still absent) concurred in opinion with the referee, who thought that the reference was confined to the dispute about the rum; and signed, with him, a report, in favour of the plaintiff, for 1837 dollars and 45 cents; but the other referee, persevering in his opinion of the general nature of the subject submitted, declined joining in the report.

Exceptions were filed by the defendants; but the only one pressed in argument, upon the Court, was, "that the umpire had "not himself heard, from the parties themselves, their respective "allegations and arguments, on the merits of the controversy."

For the defendants, it was urged, that an umpire, being a judge, ought to hear for himself, and not through another, the evidence and the reasoning, on which he is to decide; that it is, also, the right of every suitor, to be heard himself, originally, and

and not to have his cause depend upon a second hand report of his proofs and arguments; and that, in the present instance, the umpire might have been induced to view the facts and principles of the case, in a different point of light, if they had been presented by the parties, who were alone interested to give them all their force. 1 *Dall. Rep.* 293. 1802.

For the plaintiff, it was observed, that however widely the parties differed on facts and principles, the referees knew no diversity of sentiment, but upon the single question, how far the rule of reference extended. Their general statements, therefore, to the umpire, were in unison; and he examined, for himself, all the accounts, which the parties had exhibited. It has been decided, in *Hall* v. *Lawrence*, 4 *T. Rep.* 589. that the award of an umpire will not be set aside, because he received the evidence from the arbitrators, without examining the witnesses himself, unless such a re-examination was expressly requested.

By the COURT: The case of *Hall* v. *Lawrence* was decided in 1792. It is not, therefore, binding upon us, as an authority; and, upon principle, we cannot accede to the decision. The plainest dictates of natural justice, must prescribe to every tribunal, the law, that "no man shall be condemned unheard." It is not merely an abstract rule, or positive right; but it is the result of long experience, and of a wise attention to the feelings and dispositions of human nature. An artless narrative of facts, a natural and ardent course of reasoning, by the party himself, will sometimes have a wonderful effect upon a sound and generous mind; an effect, which the cold and minute details of a reporter, can neither produce, nor supplant. Besides; there is scarcely a piece of written evidence, or a sentence of oral testimony, that is not susceptible of some explanation, or exposed to some contradiction: there is scarcely an argument that may not be elucidated, so as to ensure success; or controverted, so as to prevent it. To exclude the party, therefore, from the opportunity of interposing, in any of these modes (which the most candid and the most intelligent, but a disinterested, person, may easily overlook) is not only a privation of his right; but an act of injustice to the umpire; whose mind might be materially influenced by such an interposition.

Under these impressions, and upon the single ground, to which they relate, we are, unanimously, of opinion, that the report of the referees must be set aside.

Report set aside.

M. Levy, and *Franklin*, for the plaintiff.
Ingersoll, *Moylan*, and *Hopkinson*, for the defendants.

1802.

Levy *versus* The Bank of the United States.

THIS was an action brought upon the following circumstances, which appeared in evidence upon the trial of the cause.

The plaintiff, Mr. *Levy*, kept his cash account with the bank of the *United States*. On the 3d of *August* 1798, between 11 and 12 o'clock in the forenoon, his student presented for payment a check on the bank, dated the 31st of *July* 1798, purporting to be drawn by *Charles Wharton*, in favour of *Joseph Thomas*, (to whom Mr. *Levy* had paid the money) or bearer, for 2,600 dollars: and the amount was regularly and promptly entered to Mr. *Levy's* credit, in his cash book, in the usual form, as of a deposit of cash. At the examination of the checks, in the afternoon of the same day, the check in question was discovered to be a forgery; the entry was cancelled in the bank books; and one of the clerks was sent to Mr. *Levy*, about 4 o'clock, to inform him of it, to return the forged check, and to demand his check in lieu of it. This clerk, at first, told Mr. *Levy*, that the check was not good, because Mr. *Wharton* had not the money in bank; to which Mr. *Levy* replied, "*that* is nothing to me." The clerk then told him, that the check was forged; on which Mr. *Levy*, with great surprise, said, "that he would take till to-morrow, to consider of the propriety of giving his own check in exchange for it." The clerk urged an immediate exchange of checks, declaring, "that although he was not authorised by the cashier to give such "notice, he was confident the amount of the forged check would "be retained by the bank, in their account with Mr. *Levy*." The clerk deposed, that Mr. *Levy* thereupon answered: "On that "score we are perfectly agreed: if the check is a forgery, it is "no deposit; but I wish sometime to ascertain the fact." On the 4th of *August*, however, Mr. *Levy* informed the president of the bank, that he would not refund the money, nor allow the entry to his credit, to be erased from his bank book. He then drew a check on the bank, for the balance of his account, which was paid, except to the amount of the forged check; and to recover that amount, the present action was instituted.

It, also, appeared in evidence, that *Thomas's* forgeries were suspected by individuals, so early as the 31st of *July*, but the fact was not generally known till the 3d of *August* 1798; that between 9 and 10 o'clock of the night of the 3d of *August*, he executed, in *Philadelphia*, an assignment of his property, in trust for the benefit of his creditors; and that an hour, or two, afterwards, he absconded from the city.

The cause, upon these facts, underwent three several arguments: 1st, on the trial before the jury; 2d, on a motion for a new trial; and, 3d, on a writ of error, in the High Court of Errors

rors and Appeals: but, in every stage, the decision was in favour of the plaintiff; and the points of argument, and the authorities cited, were the same, throughout the discussion. 1802.

For the plaintiff, it was contended, 1st. That the entry in the bank book, was tantamount to a payment, in cash, of the forged check; and that it is on the ground of that payment, not of the forgery, the plaintiff claims. 2d. That the bank, the drawees of the check, had no power to rescind, or annul, the payment, on account of the subsequent discovery of the forgery. 3d. That the plaintiff's sudden misconception of his legal rights, in his conversation with the clerk of the bank, did not constitute a promise to refund, in law, equity, or conscience. And the following authorities were cited, in the course of the argument: 2 *Stra.* 946. 1 *H. Bl.* 316. 1 *Salk.* 127. 4 *Vin. Abr.* 265. *pl.* 3. 2 *Bernard.* 82. *Bull. N. P.* 273. 3 *Burr.* 1516. 7 *T. Rep.* 420. 3 *Burr.* 1355. 1 *Bl. Rep.* 390. 1 *T. Rep.* 655. *Kyd on Exch.* 134. 48. 100. 3 *T. Rep.* 127. 129. 132. 325. 335. 4 *T. Rep.* 325. 335. 7 *T. Rep.* 604. 612. *Ambl.* 503. *Doug.* 611. 637. 3 *Woodes.* 115. 7 *T. Rep.* 423. 430. 6 *T. Rep.* 139. 143. *Cowp.* 565. *Leach. C. L.* 189. 5 *Burr.* 2670. 1 *T. Rep.* 713. 2 *Br. Ch. Ca.* 150. *United States* v. *Bank.* (1)

For the defendant, it was contended, 1st. That the entry to the plaintiff's credit, in the bank book, was made by mistake; was corrected as soon as it was discovered; and was not, in its nature, or in mercantile usage, equivalent to a payment in cash. 2d. That although there were some features of similitude, between bills and checks, they were not so strictly analogous, (for instance, there is no acceptance of a check, and so it is not taken on the acceptor's credit) that all the principles applicable in the one case, must govern in both cases. 3d. That the acceptor of a bill of exchange is not precluded from showing, that the drawer's hand writing is forged, in an action brought *by the payee*. 4th. That the plaintiff's conversation with the clerk of the bank amounted to a promise to refund; or, at least, induced the bank to suspend any inquiry for *Thomas*. 5th. That the plaintiff is not entitled to recover, because he claims through a felony. And the following authorities were cited: 1 *Burr.* 642. 6 *T. Rep.* 189. 143. 1 *Ld. Raym.* 743. 2 *Stra.* 946. 1 *H. Bl.* 316. 1 *Salk.* 127. 2 *Stra.* 1051. 1 *Stra.* 648. *Kyd*, 60. 90. 1 *T. Rep.* 654, 5. 3 *T. Rep.* 127. *Cowp.* 566. 6 *T. Rep.* 139. 2 *P. Wms.* 76. *Ambl.*

(1) *The United States* v. *The Bank of the United States*. This cause wat tried in the Federal Circuit Court, on the 17th of *October* 1800, before PATERSON and PETERS, *Justices*. In the course of the discussion, *Ingersoll*, for the defendants, admitted and stated, that if a man accepts a forged bill, or draft, he is not only conscientiously, but legally bound to pay it. And each of the Judges expressly declared their concurrence in the admission.

1802. 503. 2 *Br. Ch.* 150. 2 *T. Rep.* 420. 424. *Kyd*, 202, 3. 1 *T. Rep.* 167. 1 *Stra.* 508. 2 *Stra.* 1175. 1 *Ld. Raym.* 444.

The COURT delivered a charge to the jury decidedly in favour of the plaintiff; the *Chief Justice* declaring, that he thought any attempt to distinguish between a credit in the bank book of a customer, and an actual cash payment, as impolitic on the part of the bank, as it was unjust towards the individual, who accepted the credit, instead of his money.

The verdict found for the plaintiff the sum demanded, and interest: and (after an ineffectual motion for a new trial, as above stated) a judgment was rendered upon the verdict, which was affirmed upon a writ of error.

Ingersoll, *E. Tilghman*, *M'Kean*, and *Dallas*, for the plaintiff.
Rawle, and *Lewis*, for the defendants.

SUPREME COURT

OF

PENNSYLVANIA.

September Term 1802.

Attorney-General *versus* The Grantees under the act of April 1792.

ON the 2d of *April* 1802, an act of the general assembly was passed, entitled "An Act to settle the controversies arising from contending claims to land, within that part of the territory of this commonwealth north and west of the rivers *Ohio* and *Alleghany*, and *Conewango* creek," (*5 State Laws*, 153.) by which the Judges of the Supreme Court were directed to devise an issue, for trying the following questions, at *Sunbury*, in *Northumberland* county:

1st. Are warrants heretofore granted under the act of the 3d of *April* 1792, valid and effectual in law against this commonwealth, so as to bar this commonwealth from granting the same land to other applicants under the act aforesaid, in cases where the warrantees have not fully and fairly complied with the conditions of settlement, improvement, and residence, required by the said act, at any time before the date of such warrants respectively, or within two years after?

2d. Are the titles that have issued from the land-office, under the act aforesaid, whether by warrant or patent, good and effectual in law against this commonwealth, or any person claiming under the act aforesaid, in cases where such titles have issued on the authority and have been grounded upon the certificates of two justices of the peace, usually called prevention certificates, without any other evidence being given of the nature and circumstances of such prevention, whereby, as is alleged, the conditions of settlement, improvement, and residence, required by the said act, could not be complied with?

The judges, having devised and published the form of a feigned issue, on a wager, to try these questions; having given public notice,

1802. notice, that all parties interested in the issue would be heard at the trial; and having settled and prescribed the other necessary proceedings; three of them (YEATES, SMITH, and BRACKENRIDGE, *Justices*) assembled at *Sunbury*, on the 25th of *November* 1802; when a jury was impanneled, and the case argued, by the *Attorney-General* (*M'Kean*) *W. Tilghman*, and *Cooper*, for the commonwealth, in the negative of the propositions contained in the questions; but no counsel appeared to argue, in the affirmative. (1) On the next day, the presiding Judge delivered the following charge to the jury:

YEATES,

(1) The reasons, for not embracing this opportunity to discuss the subject, are assigned by the counsel of the *Holland* company, in a letter addressed to the Judges of the Supreme Court:

" Gentlemen,

" Having attentively considered the suggestions which were made yesterday, during the conference at the chambers of the *Chief Justice*, on the subject of the act of the general assembly, passed at the last session, with a view to settle the controversies arising from contending claims to lands north and west of the rivers *Ohio* and *Alleghany*, and *Conewango* creek, we beg leave briefly to submit the result, as a justification for the advice that will be given to our clients.

" 1st. Although the *Holland* company and their counsel cannot approve the terms of the preamble of the act, by which the legislature has undertaken to declare the meaning and construction of the original contract (the very point in controversy) and though they cannot admit the right or propriety of dictating a new, and, perhaps, unconstitutional mode, of settling a judicial question, without the assent of all the parties in interest; yet they feel the importance of an early decision, and would cheerfully concur in any form of proceeding, by which the merits of the case could be fully and fairly investigated and decided.

" 2d. The merits of the case on the part of the *Holland* company, as disclosed to the Supreme Court on the motion for a *mandamus*, and as presented to the legislature, evidently involve the following considerations: 1st. Whether the company have complied with the condition of the 9th section of the act of *April* 1792? 2d. Whether the reasons assigned for a non-compliance with the condition, bring their case within the proviso? 3d. Whether the proviso operates upon cases that are brought within its terms, to discharge the condition entirely, or only to enlarge the time for performing it? 4th. Whether the company have so persisted in their endeavours to perform the condition, as to be still within the benefit of the proviso? And, 5th. Whether the government, by prescribing the evidence, on which patents had actually issued, in cases brought within the proviso, could now take advantage of the forfeiture, for a supposed non-compliance with the original condition?

" 3d. But the questions which the legislature has proposed are the following: 1st. Are warrants heretofore granted under the act of the 3d day of *April* 1792, valid and effectual in law against this commonwealth, so as to bar this commonwealth from granting the same land to other applicants under the act aforesaid, in cases where the warrantees have not fully and fairly complied with the conditions of settlement, improvement, and residence, required by the said act, at any time before the date of such warrants respectively, or within two years after? 2d. Are the titles that have issued from the land-office under the act aforesaid, whether by warrant or patent, good and effectual in law against this commonwealth, or any person claiming under the act aforesaid, in cases where such titles have issued on the authority, and have been grounded upon the certificates of two justices of the peace, usually called " prevention certificates," without any other evidence being given of the nature, and circumstances of such prevention, whereby, as is alleged, the conditions

YEATES, *Justice*. That the decision of the Court and Jury on the present feigned issue should "settle the controversies arising "from contending claims to lands north and west of the rivers "*Ohio* and *Alleghany*, and *Conewango* creek," is an event devoutly to be wished for by every good citizen. "It is indispen- "sably necessary that the peace of that part of the state should "be preserved, and complete justice done to all parties interest- "ed, as effectually as possible." (*Close of Preamble to the Act of 2d of April* 1802, *p.* 155.) 1802.

We have no hesitation in declaring, that we are not without our fears, that the good intentions of the legislature, expressed in the law under which we now sit, will not be effected. We hope we shall be happy enough to acknowledge our mistake hereafter.

It is obvious that the validity of the claims of the warrant-holders, as well as of the actual settlers, must depend upon the true and correct construction of the act of the 3d of *April* 1792, considered as a solemn contract between the commonwealth and each individual.

The circumstances attendant on each particular case, may vary the general legal conclusion in many instances.

We proceed to the discharge of the duties enjoined on us by the late act.

tions of settlement, improvement, and residence, required by the said act, could not be complied with? These questions, in our opinion, exclude an investigation and decision upon any other point than the following: 1st. Whether, if the *Holland* company have not performed the condition, on which the warrants originally issued, within two years, though the residence could not be completed till the expiration of five years, the state is barred from granting the same lands to other applicants? and, 2d. Whether patents having issued on the evidence of prevention certificates alone, they are not void, so as to authorise the state to sell the same land to other purchasers?

"4th. On the first of these points, we observe, that it has never been contended, that the *Holland* company have performed the condition within two years; but only, that the condition was discharged, or suspended, by the operation of the proviso, on the facts of their case; particularly the fact that an *Indian* war existed for several years, beyond the term of two years specified in the act of assembly. And on the second point, it is sufficient to say, that although the prevention certificate was the evidence prescribed by the public officers, and ought, therefore, to be binding on the government, yet that even waiving that objection, the patentees will be deprived of their land, when other satisfactory and legal evidence was, and is, in their power, to prove the circumstances which entitled them to patents.

"Without recurring to the many other obvious objections to the form and provisions of the act of assembly, we are confident that the view which has been offered upon the subject, will justify our advising the *Holland* company to decline becoming a party to the suit proposed to be instituted; since, we repeat, a decision on the two abstract questions proposed by the legislature, would still leave untouched and undecided, the great and essential part of the controversy.

(Signed) "J. INGERSOLL,
"W. LEWIS,
"A. J. DALLAS.

"*Philadelphia, June* 24, 1802."

The

1802. The first question proposed to our consideration is as follows: Are warrants heretofore granted under the act of the 3d of *April* 1792, valid and effectual in law against this commonwealth, so as to bar this commonwealth from granting the same land to other applicants under the act aforesaid, in cases where the warrantees have not fully and fairly complied with the conditions of settlement, improvement, and residence, required by the said act, at any time before the date of such warrants respectively, or within two years after?

It well be proper here to observe, that on the motion for the *mandamus* to the late secretary of the land-office, at the instance of the *Holland* company; the members of this Court, after *great* consideration of the subject, were divided in their opinions. The *Chief Justice* seemed to be of opinion, that if the warrantee was "by force of arms of the enemies of the *United States*, prevented "from making an actual settlement, as described in the act, or "was driven therefrom, and should *persist* in his endeavours to "make such actual settlement thereafter," it would amount to a performance of the condition in law. Two of us (YEATES and SMITH) thought, that in all events, except the death of the party, the settlement and residence contemplated by the act, should precede the vesting of the complete and absolute estate, and that "every warrant-holder should cause a settlement to be "made on his lands within two years *next after* the date of the "warrant, and a residence thereon for five years *next following* "the first settlement, on pain of forfeiture, by a new warrant; "but if, nevertheless, he should be interrupted or obstructed by "the force of the enemy from doing those acts within the limited periods, and should afterwards persevere in his efforts in a "reasonable time after the removal of such force, until these objects should be accomplished, no advantage shall be taken of "him, for the want of a successive *continuation* of his settlement." To this opinion Judge BRACKENRIDGE subscribes.

It would ill become us to say, which of these constructions is entitled to a preference. It is true, that in the preamble of the act of the 2d of *April* 1802, (*p.* 154.) it is expressed, that "it "appears from the act aforesaid, (3d of *April* 1792) that the commonwealth regarded a full compliance with those conditions of "settlement, improvement, and residence, as an indispensable "part of the purchase, or consideration, of the land itself." But it is equally certain, that the true test of title to the lands in question must be resolved into the legitimate meaning of the act of 1792, extracted *ex viceribus suis*, independent of any legislative exposition thereof. I adhere to the opinion which I formerly delivered in Bank; yet, if a different interpretation of the law shall be made by Courts of a competent jurisdiction *in the dernier resort*, I shall be bound to acquiesce, though I may not be able to change my sentiments. If the meaning of the first question be,

be, are titles under warrants issued under the law of the 3d of *April* 1792, for lands north and west of the rivers *Ohio* and *Alleghany*, and *Conewango* creek, good and available against the commonwealth, so as to bar the granting of the same land to other applicants, where the warrantees have not fully and fairly complied with the conditions of settlement, improvement, and residence, required by the law, at any time before, or within two years after, the dates of the respective warrants, *in time of profound peace, when they were not prevented from making such actual settlement by force of arms of the enemies of the United States*, or reasonable and well-grounded fear of the enemies of the *United States*? The answer is ready in the language of the acts before us, and can admit of no hesitation. 1802.

"No warrant or survey for those lands shall vest any title, unless the grantee has, prior to the date of such warrant, made, or caused to be made; or shall within the space of two years next after the date of the same, make, or cause to be made, an actual settlement thereon, by clearing, &c. and in default thereof, it shall and may be lawful to and for the commonwealth to issue new warrants to other actual settlers for the said lands, or any part thereof, &c." (*Act of the 3d of April* 1792, *sec.* 8.) For "the commonwealth regarded a full compliance with the conditions of settlement and residence as an indisputable part of the purchase or consideration of the lands so granted." (*Preamble to Act of* 1802.)

But if the true meaning of the question be, Whether under *all* given, or supposed, circumstances of *peace* or *war*, of times of *perfect tranquillity*, or *imminent danger*, such warrants are not *ipso facto* void and dead in law, *we are* constrained to say, that our minds refuse assent to the general affirmative of the proposition.

We will exemplify our ideas on this subject. Put the case, that a warrant taken out early in 1792, calls for an island, or describes certain land, with accuracy and precision, by the course of waters, or other natural boundaries, distant from any military post, and that the warrantee, after evidencing the fullest intentions of making an actual settlement on the lands applied for, by all the necessary preparation of provisions, implements of husbandry, labourers, cattle, &c. cannot, with any degree of personal safety, seat himself on the lands within two years after the date of the warrant, and by reason of the just terror of savage hostilities? Will not the proviso in the 9th section of the act of the 3d of *April* 1792, excuse the *temporary* non-performance of an act, rendered highly dangerous, if not absolutely impracticable, by imperious circumstances, over which he had no controul?

Or: Suppose another warrant, depending, in point of description, on other leading warrants, which the district surveyor, either from the state of the country, the hurry of the business of his office, or other causes, could not survey until the two years were

1802. nearly expired, and the depredations of the *Indians* should intervene for the residue of the term, will not this also suspend the operation of the forfeiture? Nothing can be clearer to *us*, than that the terms of the proviso embrace and aid such cases; and independent of the strong expressions made use of, *we* should require strong proof to satisfy our minds that the legislature could possibly mean to make a wanton sacrifice of the lives of her citizens.

It is said in the books, that conditions rendered impossible by the act of God, are void. *Salk.* 170. 2 *Co.* 79. *b.* *Co. Lit.* 206. *a.* 290 *b.* 1 *Roll. Abr.* 449. *l.* 50. 1 *Fonb.* 199.

But *conditions precedent* must be strictly performed to make the estate vest, and though become impossible, even by the act of God, the estate will not vest; *aliter* of *conditions subsequent.* 12 *Mod.* 183. *Co. Lit.* 218. *a.* 2 *Vern.* 339. 1 *Ch. Ca.* 129. 138. *Salk.* 231. 1 *Vern.* 183. 4 *Mod.* 66. *We* desire to be understood to mean, that the "prevention by force of arms of the enemies of "the *United States*," does not, in *our* idea, absolutely dispense with and annul the conditions of actual settlement, improvement, and residence, but that it *suspends* the forfeiture by protracting the limited periods. Still the conditions must be performed *cy pres*, whenever the real terror arising from the enemy has subsided, and he shall honestly persist in his endeavours to make such actual settlement, improvement, and residence, until the conditions are fairly and fully complied with.

Other instances may be supposed, wherein the principles of prevention may effectually be applicable. If a person, under the pretence of being an actual settler, shall seat himself on lands, previously warranted and surveyed within the period allowed, under a fair construction of the law, to the warrantee, for the making his settlement, withhold the possession, and obstruct him from making his settlement, he shall derive no benefit from this unlawful act. If the party himself is the cause, wherefore the condition cannot be performed, he shall never take advantage. *Co. Lit.* 206. *Doug.* 661. 1 *Roll. Abr.* 454. *pl.* 8. *Godb.* 76. 5 *Vin.* 246. *pl.* 25.

We trust that *we* have said enough to convey *our* sentiments on the first point. Our answer to the question, as proposed, is, that such warrants may or may not be valid and effectual in law against the commonwealth, according to the several times and existing facts accompanying such warrants. The result of *our* opinion, founded on our best consideration of the matter is, that every case must depend on, and be governed by, its own peculiar circumstances.

The second question for decision is, Are the titles that have issued from the land-office under the act aforesaid, whether by warrant or patent, good and effectual against the commonwealth, or any person claiming under the act aforesaid, in cases where such

such titles have issued on the authority, and have been grounded on the certificates of two justices of the peace, usually called prevention certificates, without any other evidence being given of the nature and circumstances of such prevention, whereby, as is alleged, the conditions of settlement, improvement, and residence, required by the said act, could not be complied with? 1802.

It was stated in evidence on the motion for the *mandamus*, and proved on this trial, that the board of property being desirous of settling a formal mode of certificate, on which patents might issue for lands north and west of the rivers *Ohio* and *Alleghany*, and *Conewango* creek, required the opinion of Mr. *Ingersoll*, the then attorney-general thereon; and on due consideration, a form was afterwards adopted on the 21st of *December* 1797, which was ordered to be published in the *Pittsburgh* gazette, and patents issued of course, on the prescribed form being complied with.

The received opinion of the supreme executive magistrate, the attorney-general, the board of property, and of a respectable part of the bar, (whose sentiments on legal questions will always have great and deserved weight) at that day, certainly was, that if a warrant-holder was prevented by force of arms of the enemies of the *United States* from making his actual settlement, within two years after the date of his warrant, and afterwards persisted in his endeavours to make such settlement, that the condition was extinguished and gone. *Persisting in endeavours*, was construed to mean something; attempts, essays, &c.; but that did not imply absolute success, or accomplishment of the objects intended to be effected. By some it was thought, that the endeavours were only to be *commensurate as to the time* of making the actual settlement, and were tantamount, and should avail the parties "in the same manner as if the actual settlements had been made and continued."

The decisions of the Court in *Morris's Lessee* v. *Neighman* (1) and others at *Pittsburgh*, *May* 1799, tended to make the former opinion questionable; and two of the justices of the Supreme Court adopted a different doctrine, in their judgment between the *Holland* company and *Tench Cox*. (2)

In the argument in that case, it was insisted by the counsel for the plaintiffs, that the board of property in their resolves, and the governor by his patent, represented the commonwealth *pro hac vice;* and that interests vested under them, which could not afterwards be defeated.

We cannot subscribe hereto. If the conditions of settlement, improvement, and residence, are indispensable at all events; they become so by an act of the different branches of the legislature. The governor who has a qualified negative in the passing of laws,

(1) See *ante*. p. 209. (2) See *ante*. p. 170.

cannot

1802. cannot *dispense* with their injunctions; and it cannot be said that this case falls within the meaning of the 9th section of the second article of the constitution. "The governor shall have power to "remit fines and forfeitures, and to grant reprieves and pardons "except in case of impeachment." It relates merely to penalties consequent on public offences. Nor can it be pretended that the board of property, by any act whatever of their own, can derogate from the binding force of law. But the fact is, an intention of dispensing with the law of 1792, cannot with any degree of justice be ascribed to the governor, or board of property, for the time being. They considered themselves in their different functions virtually discharging their respective duties, in carrying the act into execution, according to the general received opinion of the day; they never intended to purge a forfeiture if it had really accrued, nor to excuse the non-performance of a condition if it had not been complied with; agreeably to the public will expressed in a legislative contract.

The rule of law is thus laid down in *England*. A false or partial suggestion by the grantee of the king *to the king's prejudice*, whereby he is deceived, will make the grant of the king void. *Hob.* 229. *Cro. E.* 632. *Yel.* 48. 1 *Co.* 44. *a.* 51. *b.* 3 *Leon.* 5. 2 *Hawk.* 398. *Black.* 226. But where the words are the words of the king, and it appears *that he has only mistaken the law, there he shall not be said to be so deceived to the* avoidance of the grant. *Per* Sir *Samuel Eyre, Just. Ld. Ray.* 50. 6 *Co.* 55. *b.*—56 *b. accord.* But if any of the lands concerning which the question arises, became forfeited by the omission of certain acts enjoined on the warrant-holders, they do not escheat to the governor for the time being, for his benefit, nor can he be prejudiced as governor by any grant thereof, they become vested in the whole body of the citizens, as the property of the commonwealth, subject to the disposition of the laws.

We are decidedly of opinion, that the patents, and the prevention certificates recited in the patents, are not conclusive evidence against this commonwealth, or any person claiming under the act of 3d of *April* 1792, of the patentees having performed the conditions enjoined on them, although they have pursued the form prescribed by the land-officers. But we, also, think, that the circumstance of recital of such certificates will not *ipso facto* avoid and nullify the patent, if the actual settlement, improvement, and residence, pointed out by the law, can be established by other proof.

We must repeat on this head, what we asserted on the former, that every case must be governed by its own peculiar circumstances. Until the facts really existing, as to each tract of land, are ascertained with accuracy, the legal conclusion cannot be drawn with any degree of correctness. *Ex facto oritur jus.*

2d. Here we feel ourselves irresistibly impelled to mention a difficulty, which strikes our minds forcibly. *Our* reflections on the subject

subject have led us to ask ourselves this question on our pillows: What would a wise, just, and independent, chancellor decree on the last question? Executory contracts are the peculiar objects of chancery jurisdiction, and can be specifically enforced by chancery alone. Equity forms a part of our law, says the late Chief Justice truly. 1 *Dall.* 213. 1802.

If it had appeared to such a chancellor, by the pleadings, or other proofs, that the purchase money had been fully paid to the government by the individual for a tract of land, under the law of the 3d *April* 1792; that times of difficulty and danger had intervened; that sums of money had been expended to effect an actual settlement, improvement, and residence, which had not been accomplished fully; that by means of an unintentional *mistake*, on the part of the state-officers, in granting him his patent (the officers not led to that mistake by any species of fraud or deception on the part of the grantee) he had been *led into an error*, and *lulled into a confidence*, that the conditions of the grant had been *legally* complied with, and, therefore, he had remitted in his endeavours therein: Would not he think, that under all these circumstances, thus combined, equity should interpose and mitigate the rigid law of forfeiture, by protracting the limited periods? And would it not be an additional ground of equity, that the political state of the country has materially changed since 1792, by a surrender of the western posts to the government of the *United States*, and peace with the *Indian* nations, both which render an immediate settlement of the frontiers, in some measure, less necessary than heretofore?

But it is not submitted to us to draw the line of property to these lands; they must be left to the cool and temperate decisions of others, before whom the questions of title may be agitated: We are confined to the wager on the matters before us; and on both questions *we* have given you *our* dispassionate sentiments, formed on due reflection, according to the best of our judgment. We are interested merely as common citizens, whose safety and happiness is involved in a due administration of the laws. We profess, and feel, an ardent desire, that peace and tranquillity should be preserved, to the most remote inhabitants of this commonwealth.

The jury found a general verdict in favour of the attorney-general, on the feigned issue; and judgment was rendered in these words: "*Whereupon* it is considered by the Court here, "that the said attorney-general do recover of the said grantees, "his damages, costs, and charges, aforesaid, amounting in the "whole to two hundred dollars and six cents, and the Court ac- "cordingly render judgment thereon for the plaintiff, *subject to* "*the proviso* in the 9th section of the act of assembly, passed the "third day of *April* 1792."

SUPREME COURT

OF

PENNSYLVANIA.

December Term 1802.

Jones *et al. versus* The Insurance Company of North-America.

COVENANT, on a policy of insurance, dated the 30th of *November* 1792, upon *the freight* of the brig, called the *Benjamin Franklin*, valued at 3000 dollars, for a voyage "at and from "*Bourdeaux* to a port in the *United States*," against "the seas, "&c. arrests, restraints, detainments of all kings, &c." in the usual terms of the printed policies. The premium was six per cent.; and, it was declared, "that this insurance is made on the "freight of the above brig, valued at the sum insured, for two "thirds thereof, &c."

On the evidence, it appeared, that the brig sailed from *Bourdeax* on the 17th day of *November* 1792, bound for *Philadelphia*; but, on the 20th of *November*, before she had reached the mouth of the *Garonne*, she was embargoed by the *French* government. The embargo continued until the 10th of *January* 1793; when the brig prosecuted her voyage; arrived at *Philadelphia* on the 5th of *March*; and there, on delivery of the cargo, the assured received the amount of the freight, originally stipulated to be paid, from the respective shippers.

During the embargo, however, an expense was incurred, for the seamen's wages and provisions, and extra-pilotage, amounting to 875 dollars and 13 cents, for two thirds of which (according to the proportion of freight insured) the plaintiffs claimed to be indemnified, by the underwriters upon the present policy: and the validity of this claim, was the only matter in controversy, upon the trial of the cause.

For the plaintiffs, it was contended, that the expenses incurred during the embargo, were a direct consequence of the embargo, operating as a partial loss upon the freight; that, therefore, the sum

sum ought to be paid, or reimbursed, by the defendants, so far as the interest of the plaintiffs extended; that the expenses of the embargo, might either be estimated by the jury, upon a consideration of the time, and the burthen of the vessel; or from the actual disbursement (which the counsel for the defendants agreed and admitted) and that the premium, being paid for an insurance against the peril of an embargo, applied to a partial, as well as to a total, loss of the frieght. In the course of the plaintiffs' argument, the following books were cited: *Mill. on Ins.* 339. *Park*, 121. 124. *Abb.* 274, 5. 282, 3, 4, 5, 6. 2 *Marsh.* 620. 628. 2 *T. Rep.* 414. 1 *Val. Com.* 168, 169, 170. 1 *Emerig.* 539. *Park*, 53. 1 *T. Rep.* 127. 129. 132. 4 *T. Rep.* 208. 210, 211. 6 *T. Rep.* 413. 419. 422, 423. 425. *Park*, 127. 1 *Mag.* 250. 254. 7 *T. Rep.* 421. *Park*, 78. 2 *East*, 544. 1 *Bous. & Pull.* 203. *Doug.* 268. 586. 1 *East*, 228. 2 *Burr.* 696. 1802.

For the defendants, it was insisted, that on this policy upon freight, specifically, the expenses of seamen's wages, &c. during the embargo, were not recoverable; for, the brig, coming to her port of delivery in safety, had earned, and actually had received, her whole freight. Besides, it was contended, that such an allowance would be contrary to an established and uniform usage, among merchants and underwriters; and it was attempted to prove by the testimony of witnesses, and the certificates of insurance brokers (admitted by consent) that such an usage existed. The attempt failed, however, on the investigation; and the verdict of the jury gave a negative to the usage. In the course of the argument for the defendants, the following books were cited. 1 *T. Rep.* 127. *Park*, 59. 2 *Marsh.* 628. 4 *T. Rep.* 210. *Abb.* 221, 2, 3. 2 *Marsh.* 570. 625, 6. 628. 1 *Emerig.* 539. *Pothier*, "*Charter Party.*" 35. *Park*, 116. *Abb.* 228, 9. 2 *Marsh.* 467. *Park*, 124. *Wesk.* 252, 3. 499. 135. 244. *Beawes. L. M.* 137. 4 *T. Rep.* 208. 1 *Mag.* 168, 9, 170.

The CHIEF JUSTICE delivered the unanimous opinion of the Court (all the Judges being present) in the charge to the jury.

SHIPPEN, *Chief Justice.* There is no direct judicial authority in the books, upon the case now before the Court. The case must, therefore, be decided either upon principle, or upon usage.

The present policy is an insurance upon freight, against the peril of an embargo, as well as against the other enumerated perils. The expense for seamen's wages and provisions, claimed upon the policy, was an immediate consequence of the embargo at *Bourdeaux*. That expense, it has been often decided, does not fall upon the underwriters of the ship, or the cargo; but, it is remarkable, that Judge BULLER (a Judge of uncommon understanding and precision) when, concurring in that opinion, emphatically adds, "*the freight* must bear it:" and, if the freight must bear it,

1802. it, the implication is strong, that the policy upon freight, must be the appropriate instrument of indemnity.

Considering the point, however, abstractedly, upon principle, it is naturally asked, why the law should admit, upon every other subject of insurance, a recovery against the underwriters, for a partial, as well as for a total, loss; and exclude such a recovery, in the instance of freight? Freight is exposed to a partial diminution of its value, as well as the ship, or the cargo; and, equally with those, contributes to the payment of a general average, arising from a loss, in its nature partial. The assured on freight, too, may abandon to the underwriters, in the same cases of a loss, not actually, but constructively, total, in which the abandonment is permitted to the assured upon the ship, or cargo. Where, then, is the ground of descrimination, upon the present question? Though the assured receive, nominally, the amount of the freight, from the shippers, they receive, in fact, so much less of the valued freight, than they would have received, if there had been no embargo, as is the amount of the expense, which the embargo occasions. The injury is done exclusively to the freight; and if the detention were long, it might, in some cases, amount to the whole freight. Now, every insurance is meant to be an indemnity; but refuse to pay the assured upon freight, the extra-charge, a charge not contemplated in the ordinary course of the voyage, which falls upon freight, in consequence of an embargo (a risque insured against) and how can the insurance be called an indemnity? In short, though the case has not hitherto been expressly decided; and though we have not had much time for deliberation; yet, we think, that as far as the opinion of the Judges of *England* can be ascertained, by a fair inference, from the expressions of the books; and, we are confident, by a fair application of the principle of insurance; the plaintiffs are entitled to a verdict, unless there is a settled, uniform, usage of commerce, to the contrary.

The existence of such a usage was strongly stated, in the opening of the defence; and we expected to receive light and satisfaction from the evidence upon the subject: for, the usages of any trade; but, above all, the usages of trade and commerce, in giving a practical construction to policies of insurance; are of so high a consideration, that they are deemed to be a part of the express and written contract, whenever they are proved with sufficient certainty. Nor is a usage of trade, to be scanned by the strict rules, for the allowance of a common law custom. If it exists; if it is known and uniform; and if it is not, in itself, unlawful; it ought to prevail in the decision of a commercial controversy.

But, we confess, that we have been disappointed in our own general expectations; though we leave it to the jury (whose exclusive province it is) to decide upon the proof of the usage, in the present case. It appears, that the question has seldom occurred

curred among the merchants and underwriters of *Philadelphia*; and, in the few instances, in which it has occurred, the demand has been as often allowed, as it was rejected. Still, however, we repeat, the jury have a right to pronounce their own sense of the evidence. If they think, a commercial usage upon the subject has been proved, in opposition to the claim of the plaintiffs, their verdict must be for the defendants. But, in the absence of any commercial usage, the weight of authority and principle, seems to call for a contrary decision. 1802.

Verdict for the plaintiffs.

Dallas, for the plaintiffs.
Ingersoll, *E. Tilghman*, and *Moylan*, for the defendants.

The same Cause.

THE charge was delivered on *Friday* evening, the 17th of *December*, and the Court immediately adjourned. On the next morning, when the jury were at the bar, ready to deliver a verdict, the defendant's counsel, for the first time, tendered exceptions to the charge of the Court. The counsel for the plaintiff insisted, that the exceptions were tendered too late; and the Court kept the subject under advisement, that the parties might examine the precedents.

At a subsequent day, the plaintiffs' counsel, admitted that there was a variance in the precedents; and that the statute of *West.* 2. 13 *Ed.* 1. (which gives the bill of exceptions) is silent on the point. But he contended, that as all the books of practice declare, that the exception must be taken *at the trial;* and that the bill itself must be tendered before the verdict; the notice of the exception must be taken, *instanter*, when the exceptionable matter occurs, though the form may be afterwards drafted. *Bull. N. P.* 315. 319. *Tidd.* 312. 314, 315. 317. 1 *Salk.* 288. 2 *Bl. Rep.* 929. *Cowp.* 494. 1 *Bl. Rep.* 556. 11 *Mod.* 175, 6. 8 *Mod.* 220, 1. 2 *H. Bl.* 200. 8. 2 *T. Rep.* 54. 3 *Burr.* 1692. 1 *Bl. Com.* 556, 7. *Lilly's Ent.* 249, 250. 275. 1 *Bons. & Pull.* 32. *Cro. C.* 341. *Doug.* 122.

The opposite counsel, referring to the same precedents, relied upon the the form in *Bull. N. P.* and insisted, that a bill of exceptions to the charge, might be tendered at any time before the verdict.

By the COURT: On a consideration of the authorities cited, and of our own practice, we do not think, that the defendants were too late in tendering their exceptions. The bill, therefore, may be reduced to form, and will be allowed. Even if we had

 doubted

1802. doubted on this point, we should have been inclined to afford an opportunity, for the revision of our opinion on the principal question; however satisfied we are, in our own minds, that it is correct in principle and law. (1)

Cochran *et al. versus* Cummings.

CASE, for goods sold and delivered. There was a special defence, that the defendant had sold, and conveyed to the plaintiffs, a quantity of land in the county of *Northumberland*, in satisfaction of their demand; and the deed of conveyance, dated in *June* 1799, was produced. But the plaintiffs insisted, 1st. That they took the conveyance only as a collateral security: and, 2dly. That they were imposed upon by the defendant, as to the *quality* of the land.

On the first point, the evidence was contradictory; and the COURT left it, implicitly, to be decided by the jury.

On the second point, it was proved, that the defendant had represented the land as very valuable; saying, that it was such as would sell, in two or three years, for a price, from two to six dollars an acre: but, in fact, the land was a part of a mountain, commonly called "*Jack's Second Mountain*;" so rude, that it could not be cultivated; and so steep, that it was inaccessible, even to take off the wood, without incalculable expense and labour. In the charge of the COURT, on this point, it was said,

By SHIPPEN, *Chief Justice*: Wherever there is a gross misrepresentation of facts, relating to the subject of a contract, the contract is fraudulent and void. If, therefore, the jury shall be of opinion, that such a misrepresentation was made, in the present instance; they should consider the conveyance as no payment, although the plaintiffs agreed, under the deception, to accept it in satisfaction; and the verdict must be for damages to the whole amount of the demand.

Verdict, accordingly, for the plaintiffs' whole demand.

Ingersoll, and *Heatly*, for the plaintiffs.
M. Levy, and *Porter*, for the defendant.

(1) In the case of *Kingston* v. *Girard*, the Court declared, that, after long and mature consideration, they were perfectly satisfied with their decision in *Jones et al.* v. *The Insurance Company of North America*. The case is still depending in the High Court of Errors and Appeals, upon the bill of exceptions. It has been once argued there; but a second argument has become necessary, in consequence of several changes on the bench.

Fitzgerald

1802.

Fitzgerald *versus* Caldwell's Executors.

THE original cause being remitted to the Supreme Court, upon the decision of the High Court of Errors and Appeals, (1) this *scire facias* was brought to enforce the judgment against *Caldwell's* executors, returnable to *September* term 1798; and issue was therein joined upon the plea of "Payment."

To maintain the plea, the defendant's counsel recapitulated the facts set forth in the report of *Fitzgerald* v. *Caldwell*, 2 *Dall. Rep.* 215.; and contended, that, while the attachments were depending, *Caldwell* was not liable for interest; that as soon as the original question had been decided, upon the trial of one of the attachments, (in *January* 1793) favourably to the claim of the present plaintiff, *Caldwell*, at his own peril, paid the principal sum, due at the time the note was given to *Fitzgerald*;(2) that no question of interest was decided by the High Court of Errors and Appeals; and that the judgment of that Court, is not a bar to the inquiry, in the present suit, whether any thing is due, either for principal, or interest.

For the plaintiff, it was urged, that by the agreement of the parties, the judgment *nisi*, rendered on the report of the referees, in *January* 1791, was made absolute, with a stay of proceedings, till one of the attachments should be tried; that this judgment, being for a sum certain, to wit, 5009*l.* 5*s.* 1*d.* carried interest, of course, unless the terms of the agreement, or the operation of law, in cases of attachment, affected the right; 1 *State Laws*, 13. *Dall. edit.* that in point of morality, as well as law, *Caldwell*, who had long detained, and advantageously employed, the money of another man, was bound to make a reasonable compensation for the use; that the decision of the Supreme Court, releasing *Caldwell* from the payment of interest, was the very foundation of the writ of error; and that the High Court of Errors and Appeals

(1) See the case, on which the writ of error was instituted, 2 *Dall. Rep.* 215. And the judgment of the High Court of Errors and Appeals, *Ibid.* 216. (*)

(2) The principal sum paid, was the amount due in *April* 1782; not the amount reported to be due by the referees (5009*l.* 5*s.* 1*d.*) and for which the judgment was rendered absolute as of *January* 1791. The claim of the plaintiff, on the *scire facias*, was, therefore, founded upon the following calculation:

	£.	s.	d.
Report of referees in *January* 1791,	5009	5	1
Two years interest, till payment in *January* 1793,	601	0	0
	5610	5	1
Deduct the amount paid in *January* 1793,	3250	0	0
	2360	5	1
Interest on the balance till payment,			

(whose

1802. (whose sentence could not now be revised, modified, or annulled) had not only affirmed the judgment rendered in *January* 1791, for the fixed sum of 5009*l.* 5*s.* 1*d.*, but had expressly reversed the order to discharge *Caldwell*, on payment of the principal sum.

SHIPPEN, *Chief Justice.* We have neither the power, nor the inclination, to impair the judgment of the High Court of Errors and Appeals, by asserting a contrary opinion, in point of law; nor by admitting evidence to undermine its authority with the jury. The judgment of *January* 1791, with all its legal incidents, can only now be affected, by proof of actual payment and satisfaction. As to the principal sum for which the judgment is affirmed (5009*l.* 5*s.* 1*d.*) there must be no dispute; and we can only now consider that part of the defendant's argument which insists, that, at least, upon the amount of the judgment, no interest ought to be allowed.

An act of the general assembly has declared, "that lawful interest shall be allowed to the creditor, for the sum, or value, "he obtained judgment for, from the time the said judgment "was obtained, till the time of sale, or till satisfaction be made." 1 *State Laws*, 13. Interest is, therefore, generally speaking, a legal incident of every judgment: but, it is contended, that the present case ought to be excepted from the rule, because an immediate payment was not contemplated by the parties themselves; and because the judgment was made absolute, on the express condition, that it should wait the trial of certain foreign attachments.

The agreement, on which the judgment was made absolute, is recognised in the decision of the High Court of Errors and Appeals, "according to its terms." The genuine meaning of its terms can only be ascertained, by considering what was the real subject in dispute under the attachments. In the attachment that was tried in *January* 1793, the dispute appeared to be simply, whether the evidence of *Moore's* interest in the debt, due from *Caldwell* to *Vance*, *Caldwell* and *Vance*, amounted to an assignment, legal or equitable. The meaning of the agreement, therefore, must have been to stay proceedings on the judgment, till that subject was investigated. Now, the subject was completely investigated on the trial, to which I allude; and the jury determined, that the debt did not remain subject to attachments, as a debt still due to *Vance*, *Caldwell*, and *Vance*; but had been previously appropriated and assigned to *Moore* and *Johnson*. It is true, that the decision of the High Court of Errors and Appeals recognises the agreement generally; and that the agreement, in its own general terms, embraces a trial of all the attachments: but, if the first attachment could not prevail, it is improbable that any subsequent attachment would succeed; and, I repeat, that in the spirit

spirit of the agreement, a discussion and decision of the principle, was alone contemplated. 1802.

In this view of the case, the only point to exercise the discretion of the Jury, will be (not whether any interest shall be allowed upon the judgment, but) from what period the interest shall begin to run. The judgment being made absolute by the agreement, a reasonable time should, perhaps, be allowed for a trial, as contemplated by the terms of the agreement; but when the trial in *January* 1793, had fixed the right of *Moore* and *Johnson* to the debt, as assignees of *Vance*, *Caldwell* and *Vance*; and when *Caldwell* himself had acquiesced, in the verdict, by paying what he thought due, without demanding an indemnity; the Court cannot perceive any legal, or equitable, ground, upon which the right of interest should be longer suspended.

Upon the whole, we think, that interest ought not to be allowed, upon the sum fixed by the judgment of *January* 1791, until the decision in *January* 1793; but that the interest ought to run from that period. Although *Caldwell* himself asked no indemnity, on the payment which he made, we shall think it proper, in aid of the executors, to direct an indemnity against the attachments to be given, before the amount of the verdict, on this occasion, is paid.

Verdict for the plaintiff. (1)

E. Tilghman, *Lewis*, and *Dallas*, for the plaintiff.
Ingersoll, and *M'Kean*, for the defendants.

The Commonwealth *versus* Gibbs.

THIS was an indictment, on the 17th section of the election law (4 *State Laws*, *p.* 342. *Dall. edit.*) which provides (among other things) that "if any officer of the election shall be "threatened, or violence used to his person, or interrupted in "the execution of his duty, every person who shall be guilty of "such intimidation, threats, violence, or interruption, being con-"victed thereof, shall be fined and imprisoned for the same, at "the discretion of the Court, not exceeding six months imprison-"ment, nor exceeding one hundred dollars fine."

The facts were briefly these: Mr. *Beckley*, the prosecutor, was appointed a judge, at the general election in *October* 1801. Mr. *Gibbs*, the father of the defendant, presented his ballot, but before accepting it, Mr. *Beckley* insisted, that he should answer the following questions: 1st. Did you, at any time during the

(1) The indemnity was given to the satisfaction of the Judges, and the executors paid the amount of the verdict into Court. Thus terminated in 1802, a suit commenced, in fact, twenty years before, in 1782!

American

1802. *American* war, join the *British* army? 2d. Or take an oath of allegiance to the king of *Great Britain*? 3d. Or were you attainted of treason against the *United States*, or the state of *Pennsylvania*? Mr. *Gibbs* declined answering the questions; and (after some altercation) his son, the defendant, shaking his fist at *Beckley*, said, "I will see you to-morrow."

Two grounds of defence were taken by *Ingersoll* and *Lewis*: 1st. That the judge of the election was not in the performance of a duty, when he proposed such questions to an elector. The act of assembly declares who may vote; and as to the enumerated requisites to constitute a right of voting, the voter's oath, or affirmation, may be demanded. After the repeal of the test laws, every citizen, who had not been attainted, had a right to vote. But the questions are not pointed to the qualification designated in the act; the answers to those questions might tend to criminate the voter himself; for, if attainted, he would still be liable, (notwithstanding the treaty of peace) to the corruption of blood, under the old state constitution, the treaty of peace not operating as a reversal of the attainder; and no lawyer ever suggested, or would assert, that a man's vote could be rejected, unless he answered questions thus tending to the exposition of his own guilt. 1 *Styl. Pr. Rep.* 675. 3 *Bl. Com.* 268. 363, 4. *Doug.* 572. *Salk.* 153. 4 *State Trials*, 747. 2d. That it is material, on the present indictment, to prove that the defendant acted with design to influence unduly, or to overawe the election, or to restrain the freedom of choice: whereas it is evidently the case of a son interposing, to protect an aged and infirm parent from insult; and his actions, as well as words, were the mere ebullition of sudden passion.

Reed and *Dickerson*, for the commonwealth, admitted that no answer could be exacted, which would expose a man to penal consequences; but they insisted, that the answers to the questions proposed (though in the affirmative) would not, at this day, involve the voter in any jeopardy of life, liberty, property, or penalty. The answers could only prove him (if in the affirmative) to be an alien; and an alien may certainly be compelled to disclose his foreign birth. *Park.* 164. The questions were calculated to ascertain a fact, on which the right to vote depended. None but citizens can vote. Now, although every man (even a native of *America*) had a right to chuse his party in the revolutionary war (1 *Dall. Rep.* 53.) yet, if he took an oath of allegiance to *Great Britain*, or joined her armies, he determined his election; and in neither of these cases, any more than in the case of an attainder, could he vote at our elections, as a qualified citizen. If, then, the judges of the election acted within the limits of an official discretion, in proposing the questions, the

lifted

lifted fist, and threatening words, of the defendant, bring the case clearly within the description and punishment of the law. 1802.

The COURT delivered a full and decided opinion, in the charge to the Jury, that the questions, proposed by the judges of the election, were illegal; that Mr. *Beckly* could not, therefore, be considered in the execution of his duty, when he insisted upon an answer to those questions; and that, consequently, the defendant was not liable to an indictment, under the election law (however he might otherwise be charged) for resisting, in the way that he did, the demand upon his father, to answer questions tending to criminate himself.

Verdict, not guilty.

The Commonwealth *versus* Franklin *et al.*

IN *August* Session 1801, of the Court of Quarter Sessions, the grand jury of *Luzerne* county presented the following indictment:

" *Luzerne* county *ss.*

" The Grand Inquest for the body of the county of *Luzerne*, " upon their oaths respectively do present, that *John Franklin*, " *Elisha Satterlee*, and *John Jenkins*, all late of the said county, " yeomen, on the first day of *August*, in the year of our Lord one " thousand eight hundred and one, at the county aforesaid, and " within the jurisdiction of this Court, unlawfully did com- " bine and conspire, for the purpose of conveying, possessing, and " settling, on certain lands within the limits of the county afore- " said, under a certain pretended title not derived from the au- " thority of this commonwealth, or of the late proprietaries of " *Pennsylvania* before the revolution, to the evil example of all " others in like manner offending, contrary to the form of the " act of general assembly of this state in such case made and " provided, and against the peace and dignity of the common- " wealth of *Pennsylvania*, &c.

" And the Jurors aforesaid, upon their oaths aforesaid, do " further respectively present, that the said *John Franklin*, *Elisha* " *Satterlee*, *John Jenkins*, and *Joseph Biles*, all late of the coun- " ty aforesaid, yeomen, on the first day of *August*, in the year of " our Lord one thousand eight hundred and one, at the county " aforesaid, did combine and conspire for the purpose of laying " out townships, by persons not appointed or acknowledged by " the laws of this commonwealth, to the evil example of all " others in like manner offending, contrary to the form of the " act of assembly of this state in such case made and provided,

" and

1802. "and against the peace and dignity of the commonwealth of "*Pennsylvania*.

"JOSEPH B. M'KEAN,
"Attorney-General."

A *certiorari* issued at the instance of the defendants, to remove the indictment from the Quarter Sessions into the Circuit Court; directed, however, to the Judges of *the Court of Common Pleas* of the county; requiring the return of an indictment against the four persons named in the second count, for both offences; and actually returned by the associate Judges of the Common Pleas.

On the trial of the indictment, in the Circuit Court, at a session held at *Wilkesbarre*, *Luzerne* county, in *May* 1802, the Jury found a special verdict, in these terms:

"And now a Jury of the county being called, came, to wit, "*Thomas Duane*, *Lazarus Denison*, *Peter Grubb*, *John Cary*, "*Nathan Beach*, *Thomas Wright*, *Ebenezer Slocum*, *Nathan Wal*-"*ler*, *Abel Pierce*, *Jacob Bedford*, *Timothy Beebe*, and *Abiel Fel*-"*lows*, who being duly impanelled, elected, sworn, and affirm-"ed, to try these issues, on their oaths and affirmations, do find "that the defendants, *John Franklin* and *John Jenkins*, did, "after the 11th of *April* 1795, at the county of *Luzerne*, con-"spire and combine for the purpose of conveying, possessing, "and settling, on lands within the said county, under a pretended "title not derived from the authority of this commonwealth, or "of the late proprietaries of *Pennsylvania* before the revolution, "contrary to the form of an act of general assembly of this com-"monwealth, passed the 11th of *April* 1795, entitled an act to "prevent intrusions on lands within the counties of *Northampton*, "*Northumberland*, and *Luzerne*. And the Jurors aforesaid, on "their oaths and affirmations aforesaid, do further find that the "said *John Franklin* and *John Jenkins*, after the 11th of *April* "1795, at the county aforesaid, did conspire and combine for "the purpose of laying out townships in the said county of *Lu*-"*zerne*, by persons not appointed or acknowledged by the laws "of this commonwealth, contrary to the form of the act of the "general assembly aforesaid; but whether the said defendants "are guilty in manner and form as they stand indicted, they "know not, and pray, therefore, the opinion of the Court. And "if the Court here should be of opinion that the said act of gene-"ral assembly is not contrary to the constitution of the *United* "*States*, or of the state of *Pennsylvania*, then they find the said "defendants guilty in manner and form as they stand indicted, "but if the Court should be of opinion that the said act of gene-"neral assembly is contrary to to the constitution of the *United* "*States*, or of the state of *Pennsylvania*, then they find the said "defendants

" defendants not guilty in manner and form as they stand indicted. 1802.
" And the said *Elisha Satterlee* and *Joseph Biles* they find not
" guilty in manner and form as they stand indicted."

Upon this finding of the jury, the defendant filed the following reasons in arrest of judgment:

1st. The law on which this indictment is grounded, is unconstitutional.

2d. The offences charged are not described with convenient and legal certainty.

3d. No act is stated, in either count, to have been committed in pursuance of the combination and conspiracy.

4th. Two different crimes are charged in the first count of the indictment.

5th. It is not stated in the second count, that the combination and conspiracy was to lay out townships within *Luzerne* county, or elsewhere, nor are the townships in any wise described.

6th. The cause was never pending in the Circuit Court.

7th. The *certiorari* is to remove an indictment against *four* persons, for *two* offences; and there is no such indictment. (1)

The act of assembly, to which the indictment and proceedings refer, was passed on the 11th of *April* 1795; 3 *State Laws*, 703. *Dall. edit.* and the sections material, in the present case, were the following:

Sec. 1. " *Be it enacted by the senate and house of representa-*
" *tives of the commonwealth of Pennsylvania, in general assembly*
" *met, and it is hereby enacted by the authority of the same*, That
" if any person shall, after the passing of this act, take possession
" of, enter, intrude, or settle on any lands, within the limits of
" the counties of *Northampton*, *Northumberland*, or *Luzerne*, by
" virtue or under colour of any conveyance of half share right,
" or any other pretended title, not derived from the authority of
" this commonwealth, or of the late proprietaries of *Pennsylva-*
" *nia* before the revolution, such person, upon being duly con-
" victed thereof, upon indictment in any Court of Oyer and Ter-
" miner, or Court of General Quarter Sessions, to be held in
" the proper county, shall forfeit and pay the sum of two hundred
" dollars, one half to the use of the county, and the other half
" to the use of the informer; and shall, also, be subject to such
" imprisonment, not exceeding twelve months, as the Court, be-
" fore whom such conviction is had, may in their discretion di-
" rect.

Sect. 2. " *And be it further enacted by the authority aforesaid*,
" That every person who shall combine or conspire for the pur-
" pose of conveying, possessing, or settling on any lands within

(1) The 6th and 7th exceptions were filed, at a subsequent stage of the cause, after the 1st exception had been over-ruled.

1802. "the limits aforesaid, under any half share right or pretended "title as aforesaid, or for the purpose of laying out townships by "persons not appointed or acknowledged by the laws of this "commonwealth, and every person that shall be accessary "thereto, before or after the fact, shall, for every such offence, "forfeit and pay a sum not less than five hundred, nor more "than one thousand dollars, one half to the use of the county, "and the other half to the use of the informer; and shall, also, "be subject to such imprisonment at hard labour, not exceed-"ing eighteen months, as the Court in their discretion may di-"rect."

It was agreed by the attorney-general, and the counsel for the defendants, that the leading question, whether the act of assembly was constitutional, or not, should be argued in the Supreme Court, before all the Judges. Notice was regularly given to the attorney of the defendants, that the case would be argued at the present term; but they did not appear, nor apply to counsel to appear for them, till the argument had actually commenced; and then, upon being refused a term's delay, their counsel (*Lewis*) for want of preparation, declined entering into the discussion.

The case was opened, and argued, by *Duncan*, for the commonwealth. He traced the history of the *Wyoming* controversy, and referred to the decree of *Trenton*, (30th *December* 1782. 8 *vol. Journ. Cong.* 83, 4.) as finally terminating the question of boundary and jurisdiction, between the states of *Pennsylvania* and *Connecticut*, in favour of the former. From that period, every settler under a *Connecticut* title, must be regarded as a wilful trespasser. 2 *Dall. Rep.* 306. The ordinary process of the law, however, was not sufficient to restrain, or repel, the intrusions upon our territory; the legislative attention was imperiously drawn to the subject; and an act was passed, on the 11th of *April* 1795, to punish, as criminal offences, the taking possession of lands, or conspiring to convey, possess, or settle, them, in the counties of *Northampton*, *Northumberland*, or *Luzerne*, under any title not derived from *Pennsylvania*. 3 *vol. State Laws*, 703. *Dall. edit.* Upon the first and second sections of this act, the present indictment is founded; and a constitutional objection is raised, to quash the indictment, and defeat the beneficial operation of the act. This constitutional objection has, on other occasions, been branched into various points.

1st. The act has been said to be a violation of the first section of the ninth article of the state constitution, which declares, "that all men are born equally free and independent, and have "certain inherent and indefeasible rights, among which are those "of enjoying and defending life and liberty, *of acquiring, pos-"sessing, and protecting property* and reputation, and of pursuing "their own happiness."

We

We answer: Property is a creature of society; and the right, in all its modifications, of acquisition, possession, and transfer, is regulated by positive law. 2 *Bl. Com.* 2. 3 *Dall. Rep.* 391. 394. From the very nature of the right of property, it is a perfect and exclusive right. The moment, that it was established, that the boundaries of *Pennsylvania* embraced the *Wyoming* district of country, the right of property became absolute and exclusive in the state; it would be absurd to suppose that *Connecticut* could, also, possess an exclusive right of property in the same land; and, yet, without such a supposition, by what principle of general law, what positive statute, what express, or implied, contract, can her grants confer a possessory, or usufructuary, interest in the land? No man could obtain from *Connecticut* a legitimate right to acquire, possess, and protect, property, which belonged to *Pennsylvania*; and the constitution could only intend to recognise and sanction a legitimate right, for those purposes. 1802.

2d. The act has been said to be a violation of the constitutions of the *United States* and of *Pennsylvania*, inasmuch as it creates a new offence; punishes, *ex post facto*, the exercise of a claim, legal in its origin; and impairs the obligation of contracts.

We answer: The intrusion, forcible or clandestine, upon the territory of a sovereign power, is an offence *malum in se*. It is an attack, not only upon the national property, but upon the national sovereignty. If done by individual citizens of another state, it is a high misdemeanor; and if done with the sanction of their government, it would be a just cause of war. But it is adding insult to outrage, when the citizens of the state itself, deny her right and authority, and parcel out her lands, under the authority of another government. The offence is flagrant, against every principle of political economy; and always has been held indictable. 2 *Hawk. P. C.* 210. 4 *Bl. Com.* 128. 32 *H.* 8. *c.* 9. Long, however, before the *Connecticut* claim began to operate, *Pennsylvania* (in 1729-30) had introduced a similar law, to prevent purchases of land from the *Indians*; & annul all contracts for that purpose; and to extend the *English* statutes of forcible entries and detainers, to the case of entry upon lands, not located, or surveyed, by some warrant, or order, from the proprietary. 1 *State Laws*, 248. *Dall. edit.* And even in the year 1700, (which law was inforced by additional sanctions in 1769, *Ibid.* 503.) it had been declared, "that if any person presume to "buy any land of the natives, within the limits of this province "and territories, without leave from the proprietary thereof, "every such bargain, or purchase, shall be void, and of no ef-"fect." *Ibid.* 5. Say, then, that the *Connecticut* title, originated in *July* 1754 (as it is alleged) in a purchase from the *Indians*: by a positive subsisting law, the purchase was void; it could afford no lawful ground for subsequent contracts; and, of course, no contract

1802. contract could, in this point of view, be impaired by the act against intrusions. Say, that the contract, is only to be regarded as between *Connecticut* and her grantees: the contract is neither annulled, nor impaired, if the subject of it belonged to *Connecticut*; but surely a contract with *Connecticut* could give no right to enter upon lands that belonged to *Pennsylvania*. The obligation of the contract lies exclusively upon *Connecticut*; and *Pennsylvania* does not, in any degree, impair it, when she merely says, that it shall not be forcibly transferred to her. If, therefore, *Pennsylvania* had a right to legislate for the protection of her property, for the vindication of her sovereignty, is there in the manner of legislating, any violation of a constitutional, or established, principle of jurisprudence? No: the offence is defined, and the punishment prescribed, not *ex post facto*, in reference to past intrusions and conspiracies; but expressly contemplating those which shall occur, after the enacting of the law.

3d. The act has been said to be a violation of the state constitution (*art.* 9. *s.* 1.) by destroying an equality of rights; inasmuch as its provisions do not apply to the whole state, but to a particular district, composed of three counties.

We answer. The grievance is local, and the remedy ought, therefore, to be locally applied. The usurpation and intrusion prevailed only in the counties of *Northampton*, *Northumberland*, and *Luzerne*; and the proceeding against the intruders by eviction and restitution, is not a novelty in our law. In criminal cases, the award of restitution always follows a conviction; and in cases of forcible entry and detainer (when, too, the public dignity is not involved) restitution is the appropriate execution of the judgment, in favour of a prosecutor.

4th. The act has been said to be a violation of the constitution, because it destroys, or suspends, the right of entry.

We answer. It cannot be seriously supported, as a legal proposition, that it is unconstitutional to deny a right of entry on lands in one state, under an authority derived from the government of another state. Even as to estates derived from herself, or as to estates belonging to her citizens, the state may, and positively does, by an act of limitation, destroy the right of entry. 2 *State Laws*, 281, 2. *Dall. edit.* But the act of assembly, in discussion, if fairly construed, does not affect a right of entry, to prevent the bar of the act of limitation, or to seal a lease, for the purposes of an ejectment: but only an entry for the purpose of intruding and settling upon the lands, in pursuance of the spurious title of *Connecticut*.

5th. The act has been said to be a violation of the state constitution, because it exercises a power, in its nature judicial, and not legislative.

We

We answer. The act neither undertakes to investigate facts, nor to pronounce a judgment. It prohibits the doing of certain acts; and if the acts are done, it leaves to the Courts of justice, the exclusive province of trying and deciding upon the case. 1802.

6th. The act is said to be a violation of the second section of the third article of the constitution of the *United States*, so far as it provides, that the judicial power shall extend to controversies between citizens of the same state claiming lands under grants of different states.

We answer. The Federal Courts have no criminal jurisdiction, except in the cases expressly authorised by the constitution and laws of the *United States*; and the present case, considered as a criminal one, is clearly not included in the delegated authority of the constitution or laws. Considered as a civil case, it is necessary, for the claim of federal cognizance, to show that *Connecticut* had actually issued *grants*, for the lands *granted* by *Pennsylvania*, which has never yet been pretended. For, the 9th article of the confederation had taken cognizance of "all controversies, "concerning the private right of soil, claimed under different "*grants* of two, or more states, whose jurisdiction, as they may "respect such lands and the states, which passed such *grants*, "are adjusted, the said *grants*, or either of them, being at the same "time claimed to have originated antecedent to such settlement "of jurisdiction." And the existing federal constitution, also, calls, expressly, for a claim of lands, under *grants* of different states, before the case of federal cognizance can arise. That the word *grant* is thus used in its legal, technical, sense; 2 *Bl. Com.* 317. and that no such grant was ever made by *Connecticut* prior to the decree of *Trenton*, will satisfactorily appear from the journals of congress: 8 *vol.* 74. 9 *vol.* 156. 10 *vol.* 294. to 299. After all, the constitution of the *United States* only secures the right of action, which may subsist without the right of entry, and is not destroyed, or impaired, by the act of assembly; an act of public police, for the purposes of internal, self government.

Dallas, in concluding for the commonwealth, divided the consideration of the general question (whether the act was constitutional?) into an inquiry, 1st. Whether *the subject* of the law, was constitutionally proper? And, 2d. Whether there was any departure from constitutional principles, in *the regulations*, for carrying the law into effect?

1st. It is the duty of every government to protect the rights of property, and to preserve the public peace. An evil subversive of those rights, fatal to that peace, existed in *Pennsylvania* at the period of passing the act. The state laws, then in force, were incompetent to a cure of the evil. The federal government could not interpose, either with its legislative, or judicial, power. And unless

1802. unless the state could administer to her own relief, the case was desperate and dreadful.

What was the evil that existed? By the decree of *Trenton*, it was settled, that *Pennsylvania* had the exclusive right of sovereignty, soil, and pre-emption, as to the lands in question; by a retrospective recognition of the boundaries, described in the charter from *Charles* the second to *William Penn*. The laws of *Pennsylvania* must, therefore, be applied to every transaction respecting those lands; and in the years 1700 and 1729, it had been made unlawful to purchase any part of them from the *Indians*. 1 *State Laws*, 5. 248. Yet, in *July* 1754, the *Susquehanna* and *Delaware* companies, in defiance of the laws, made a purchase from the *Indians*; and without a grant from *Connecticut*, or a grant from *Pennsylvania*, but merely under colour of a grant from the *Indians* (which the acts of assembly declared to be null and void) they, and persons succeeding to their pretensions, have continued, from that time to the present, to annoy the peace, and to insult the government of *Pennsylvania*, by the most flagrant acts of outrage, usurpation, and contumacy; insomuch that even an attempt was made to erect an independent state within her territory. 2 *vol. State Laws*, 82. Reviewing, however, the transactions only subsequent to the final decree of *Trenton* (30th *December* 1782) we find, that the district of country, called the *Seventeen Townships*, was all that the *Connecticut* claimants then occupied. But, still, as *Pennsylvania* had previously issued grants for the same land, she was bound to sustain the rights of her grantees. Every pacific and conciliatory instrument was employed, for that purpose, before the state resorted to force, or to denunciation. Commissioners were appointed to negotiate a compromise between the adverse claimants; and an act was passed on the 13th of *March* 1783, to suspend all process against the *Wyoming* settlers during the negotiation: 2 *vol. State Laws*, 146. *Hall & Sellers's edit.* but the commissioners were spurned, baffled, and defeated; and the suspending law was repealed, on the 9th of *September* 1783, because it was evident, that the clemency and moderation of the legislature "had been mistaken and treated "with neglect." *Ibid.* 197. The spirit of conciliation was, nevertheless, indulged much longer. An act was passed on the 15th of *September* 1784, "for the more speedy restoring the posses-"sion of certain messuages, lands, and tenements, in *Northum-"berland* county, to the persons who lately held the same," and had been violently evicted. *Ibid.* 391. An act of oblivion and pardon was, also, passed, on the 24th of *December* 1785, as to all crimes and offences committed on or before the 1st of *November* preceding, under colour of the *Wyoming* controversy; but the supreme executive council was, at the same time, authorised, to employ a competent body of the militia, in support of the magistrates. To gratify the inhabitants, a part of *Northumberland*

umberland was erected into a new county, and called *Luzerne*, on the 25th of *September* 1786. 2 *vol.* 465. 486. *Dall. edit.* But the great effort for the restoration of harmony and order, was the act, usually styled "the confirming law," passed on the 28th of *March* 1787. This act recites, that "the interfering claims "have occasioned much contention, expense, and bloodshed; and "the assembly being desirous of putting an end to those evils, "by confirming such of the *Connecticut* claims, as were acquired "by actual settlers prior to the termination of the dispute [by the "decree of *Trenton*] agreeably to the petition of a number of "the said settlers, and by granting a just compensation to the "*Pennsylvania* claimants." Commissioners were again appointed, for carrying the confirming law into effect; but "when they "met, in pursuance of the law, they were interrupted in their "proceedings by the combinations, threatenings, and outrageous "violence, of certain lawless people in the county of *Luzerne*, "and obliged to fly for the preservation of their lives;" aided by persons who were severely wounded on the occasion. The confirming law was thereupon suspended (29th *March* 1788) 3 *vol.* 450. 530. *Hall & Sellers's edit.* and, afterwards, on the 1st of *April* 1790, it was condemned and repealed, as unjust and unconstitutional. 2 *vol.* 786. *Dall. edit.* During this period of legislative patience and conciliation, it is matter of public notoriety, that every pacific overture was contemned; every coercive measure was resisted, or evaded; the powers of government were taken into the hands of voluntary associations of individuals; the sheriffs, and other public officers, were menaced and defied; the commissioners of the government were insulted, assaulted, and imprisoned; the *Pennsylvania* claimants were waylaid and murdered; the number of intruders was daily augmented; and the extent of their encroachments was indefinitely enlarged. 1802.

For the magnitude of this evil, did the laws in force, furnish an adequate remedy? The *Connecticut* claim was now spread over the whole country, extending beyond the original seventeen townships, throughout the north-western boundary of the state. Where the land was actually occupied by a *Connecticut* claimant, no *Pennsylvania* patentee could safely enter; and the danger increased, if the possession was vacant. The process of ejectment, or forcible entry and detainer, or any other civil process, was not effectual to give to the right of property, protection and enjoyment; and even the force of the militia had failed. The evil was an intrusion upon lands (not to try a title, not to submit to the dispensations of the judicial power, but) to seize, possess, and hold, by force, violence, and terror. There was no law, in existence, that could afford a remedy; and, yet, there is no man, who will contend, that a remedy ought not to be provided.

Could

1802. Could the federal government afford an adequate remedy? The case was not within their legislative, or executive, powers, either expressly, or as an incident to an express power. It is a case of *domestic violence;* as to which the federal government can only interfere, "on application of the state legislature, or of "the executive, when the legislature cannot be convened." *Const. U. S. art.* 4. *s.* 4. Nor could the judicial power of the *United States* afford relief. It provides, indeed, for a suit between citizens, claiming grants under different states; but it no where provides, for prosecutions by a state, against its own citizens, committing offences against her municipal laws. *Ibid. art.* 3. *s.* 2. *Amendments. Acts Congress*, 3 *vol.* 131. 1 *vol.* 53. *s.* 9. *Ibid.* 55. *s.* 11. *Ibid.* 57. *s.* 12. *Ibid.* 58. *s.* 13. In the *Commonwealth* v. *Cobbett.* 3 *Dall. Rep.* 467. the principle was discussed and settled; and in *Rush* v. *Cobbett*, the jurisdiction of the federal Courts, was adjudged to apply only to cases of contract; and not to a case of damages, for a libel.

The competency of the state government to redress the evil, is a necessary inference from the incompetency of any other power, known to our constitutions and laws, unless it is expressly prohibited. Now, it is not expressly prohibited; and it cannot, by any act of perversion, be assimilated to an attainder law; to an *ex post facto* law; or to a law impairing the obligation of contracts. Nor is it a legislative encroachment upon the judicial department. It decides no question of personal guilt; it inflicts no punishment; it merely declares in this, as in every instance of the penal code, what shall constitute an offence, and how the offender shall be punished.

2d. Having thus vindicated *the subject* of the law, from the imputation of being unconstitutional; it is next to be examined, whether there is any departure, from constitutional principles, in the regulations for carrying it into effect?

In the construction of a remedial statute, the previous mischief is to be considered. Here, the act of assembly describes the offence, in the very terms of the mischief: 1st. "Taking "possession of, entering, intruding, or settling on lands, &c. by "virtue, or under colour of any conveyance of half share right, "or other pretended title, not derived from the authority of this "commonwealth, &c." And, 2d. "Conspiring for the purpose "of conveying, possessing, or settling on any lands within the "limits aforesaid, under any half share right or pretended title "as aforesaid; or for the purpose of laying out townships by "persons not entitled or acknowledged, by the laws of this com-"monwealth." If the description of the offence contains nothing unconstitutional, does the nature of the punishment? No: it is fine and imprisonment; and the offender is to be removed from the premises, of which he was tortiously, and unlawfully possessed, after full notice of the law, by proclamation, and publishing in

in Court. 3 *vol. State Laws*, 703. *s.* 1, 2, 3. 6. This proceeding by indictment, and the expulsion upon conviction, are said, however, to destroy the right of entry, upon which alone the civil remedy of ejectment can be pursued. But the law contemplates no such entry, in the description of the offence; for, let it be repeated, it is a tortious entry, to hold by force; and not a lawful entry to try a right, that the legislature condemns and punishes. 1802.

After advisement and deliberation, the Judges delivered their opinions, *seriatim*.

SHIPPEN, *Chief Justice*, YEATES and SMITH, *Justices*, concurred in declaring, that the act of assembly, on which the indictment is founded, was constitutional, in all its relations.

BRACKENRIDGE, *Justice*. The second count in the indictment, is founded upon the second section of the act of assembly; and the special verdict finds expressly, that the defendants did conspire for the purpose mentioned in that section. The purpose was, "to lay out townships in the county of *Luzerne*, by persons "not appointed, or acknowledged, by the laws of this common-"wealth." Now, the term township, indicates a local jurisdiction, for objects of local police, with powers and officers to effectuate the jurisdiction; and a conspiracy by individuals to erect such townships, is an encroachment upon the rights and authority of the state. It is an offence indictable at common law; and the legislature, with a view more effectually to prevent its commission, had an unquestionable power to increase the punishment.

As to the first section of the act of assembly, I am not prepared to pronounce, that it is unconstitutional; and, consequently, I could not, even on that ground, decide, at present, to arrest the judgment. But it is enough to observe, that on the finding of the jury, I shall be ready to give judgment, for the commonwealth, on the second count of the indictment, when the subject is brought before us in the Circuit Court. (1)

(1) The cause was argued, upon the other objections, in arrest of judgment, before the Supreme Court, in *December* Term 1804. See *post*.

SUPREME COURT

OF

PENNSYLVANIA.

March Term 1803.

The Mayor, &c. *versus* Mason.

THIS was a *certiorari*, to remove the proceedings from the Mayor, into this Court; to which he made the following return under seal:

" The Mayor, Aldermen and Citizens (1) } *November* 19, 1800.
v. } Huckstring.
" *Elizabeth Mason.* } Amicable action.

" The defendant appeared before me by consent, and was " charged on the oath of *Barney Cart*, and the affirmation of *W.* " *Johnston*, clerks of the *High-street* market, in her presence, " with being a person, who follows the business of a huckster, " and selling provisions, &c. at second hand. And that the de- " fendant did this day offer for sale, within the limits of the said " market, butter, veal, pork, fowls, eggs, and nuts, contrary to " an ordinance in that case made and provided. I, therefore, ad- " judge, that the defendant pay a fine of 1*l.* 17*s.* 6*d.* and costs " 2*s.* 6*d.*"

To this return a great variety of exceptions were filed; but the argument and decision proceeded, principally, upon the following:

1st. It is not stated, at what place the defendant followed the business of a huckster.

2d. It is not stated, in what city *High-street* market is situated.

(1) An exception, that the words " of *Philadelphia*" had been omitted, in the corporate title, was waived. There were several other cases, depending on the decision in this case.

3d. It

3d. It is not stated, against which clause of the ordinance the defendant had offended. 1803.

4th. It is not stated, that the defendant was convicted, though judgment is rendered against her.

The exceptions were supported by *M'Kean* and *Porter*; who cited, 1 *Burn.* 409. 142. *Ordin.* 29 *March* 1798, *s.* 16. *Bosc.* 12. 1 *Burn.* 411. 5 *State Laws*, 265. 1 *Burn.* 413. 3 *Mod.* 159. 2 *Burr.* 1163. 4 *Burr.* 2063. 5 *T. Rep.* 253. 2 *Burr.* 1176. *Hullock.* 19. 200, 201. *Bull. N. P.* 333. *Gilb. C. P.* 225. 234, 5. *Salk.* 378. 2 *Hawk.* 250. 1 *Stra.* 316. 2 *Stra.* 1120.

Dickerson (the solicitor for the corporation) endeavoured to answer the exceptions; and cited 1 *Stra.* 316. 10 *Co.* 125. 1 *Bac. Abr.*

But, by the COURT: Some of the objections are insurmountable. In the first place, it is not sufficient to state the evidence; but the magistrate must go on to declare, that the offence was committed, and the defendant thereof convicted. Here, neither the offence, nor the conviction, are to be found in the proceedings. In the next place, we have no statement where the defendant carried on the business of huckster; and it might be where it was no offence to do so; or where the corporation had no jurisdiction to punish it as an offence. The proceedings are, therefore, manifestly erroneous, and must be set aside.

Black, Plaintiff in Error, *versus* Wistar.

IN error, from the Court of Common Pleas of *Northumberland* county. The case was, briefly, this: *William Wistar* brought an action of debt against *James Black*, in the Common Pleas, to *April* term 1798. The writ demanded a debt of 766*l.* 9*s.* 5*d.* The declaration demanded a debt of 766*l.* 4*s.* 5*d.* on a bill obligatory for that sum, dated the 28th of *May* 1796, and payable in three months with interest. On the 10th of *September* 1798, judgment was entered for 869*l.* 3*s.* 6*d.* with costs. A *fi. fa.* issued to *January* term 1799, for 766*l.* 9*s.* 5*d.* which was regularly returned, "Staid by order of plaintiff's attorney;" with an additional indorsement, signed by *Black*, the defendant below, in these words: "I agree that the sheriff return a levy on "this writ, as of the term to which it is returnable:" and such a return was accordingly made, at a subsequent period. On the 18th of *July* 1800, the sheriff held an inquest, by virtue of the above *fi. fa.* and returned the inquest annexed to the writ. The inquest condemned the property; and it was afterwards sold on a *vend. exp.* when *Wistar* became the purchaser.

The

1803.

The following errors were now assigned:

1st. The count varies from the writ, in the sum demanded.

2d. The judgment varies from both writ and count, in the sum recovered.

3d. The judgment was entered after the defendant's appearance, not in term time, nor at the settlement of the docket, nor according to any rule.

4th. The execution varies from the judgment, in the sum for which it issued.

5th. The execution was returned by the sheriff to *January* term 1799, as having been "staid by order of plaintiff's attorney;" but after that, another return was made; to wit, "that "the lands and tenements of the defendant had been levied "upon;" and an inquest was held upon the estate, in *July* 1800, by virtue of which the land, &c. was condemned, without any other authority, than the *fi. fa.* that had been returned, as aforesaid, to *January* term 1799.

6th. The general errors.

The case was argued by *W. Tilghman*, for the plaintiff in error, who cited the following authorities, principally to show, that the variances in the writ, count, judgment, and execution, were fatal. 1 *Cro.* 198. 434. 5 *Com. Dig.* 25. *C.* 13. 1 *Cro. E.* 829. 308. *Boh. Inst.* 534. *Reg. Plac.* 282. 8 *Vin. Abr.* 474. *pl.* 1. 4. *A.* 2. *Br. Error, pl.* 7. 9 *H.* 6. 38. 9 *Vin. Abr.* 474. *pl.* 6. *Co. Litt.* 288. *b.* 1 *State Laws*, 73. *s.* 9. 3 *Bac. Abr.* 369. *P. Ibid.* 570. *Roll. Abr.* 778. 3 *Com. Dig.* 313. *I.* 3.

M'Kean, for the defendant in error, proved that the judgment had been entered by the consent in writing, of the defendant's attorney, for the exact sum agreed upon. He then moved, for leave to amend the execution by the judgment; citing the following authorities, to show the extent to which amendments had been permitted, in every stage of a suit. 8 *Rep.* 157. 16 & 17 *Car.* 2. *c.* . 1 *Vent.* 100. 5 *Geo.* 1. *c.* 13. 2 *Bl. Rep.* 836. 1 *Suppl. Vin. Abr.* 228. *pl.* 6. 1 *T. Rep.* 782. 1 *Bl. Rep.* 462. 2 *Vent.* 152. 8 *H.* 6. *c.* 15. 14 *Ed.* 3. 1 *Wils.* 303. 6 *T. Rep.* 450. 1 *Sup. Vin. Abr.* 210. *pl.* 9.

The COURT (adverting to the proceedings by consent, to the means of amending the process by the præcipe, and the *fi. fa.* by the judgment) declared they had doubt upon the case.

Judgment affirmed.

Mitchell

1803.

Mitchell, Plaintiff in Error, *versus* Smith.

ERROR from the Court of Common Pleas of *Luzerne* county; where an action of debt had been brought by *Smith*, for the use of *Cash*, against *Mitchell*, upon a single bill, or sealed note, dated the 11th of *March* 1796, for 483 dollars and 33 cents, payable in three years with interest. The defendant pleaded payment, with leave to give the special matter in evidence: and thereupon issue was joined. On the evidence, it appeared, that the note was given for 1500 acres of land, lying in the township of *Smithfield*, in the county of *Luzerne*, *out of the seventeen townships*, which *Smith* conveyed to *Mitchell*, at the time of the sale; that the land had been granted to *Smith* by the committee of the *Susquehanna* company; that *Mitchell* had been in the actual and peaceable possession of the land from the time of the sale; and that he had a full knowledge of the law of *April* 1795, against intrusions under the *Connecticut* title, as well as of the general dispute, relative to lands in *Luzerne* county. On the trial in *April* term 1802, the defendant below insisted upon three points: 1st. That the consideration of the contract was illegal; and, therefore, the bill, or note, was void. 2d. That the transaction was against the policy of the law. 3d. That the consideration had failed. RUSH, *President*, in his charge to the jury, delivered an opinion against the defendant, on all the points; and concluded with stating, that "if the jury are of opinion that the defendant knew, and was acquainted with, every material circumstance, relative to the bargain, it is their duty to make him "pay the money, with the interest thereon. But if they are of "opinion, that he was, in any degree imposed upon, or purchased ignorantly; in that case, they ought to find a verdict in "his favour." (1) To this charge, a bill of exceptions was tendered

(1) The following was published, as a copy of Judge RUSH's charge:

RUSH, *President*. With respect to the first point, that is, the illegality of the bond, *this* depends upon a sound construction of the *Intrusion Law*, and has already been decided by this Court.* The act is penal and made the offences described in it indictable. The offences being wholly new and *created* by the act, the parties can be punished in no *other* way. The law says not a word with respect to the contract; but points its penalties *only* against the *Persons* of the offenders. Laws similar to this have been enacted in *England*, against forestalling, regrating, and selling pretended titles; all which inflict penalties on the *persons* of those who shall transgress them; but it has never been supposed, that they affected, or impeached, the validity of the *contract* between the parties, in the smallest degree. For these reasons, it is the opinion of the court, that the Intrusion law has not destroyed or vitiated the contract between *David Smith* and *Reuben Mitchell*.

The 2d reason assigned by the counsel for the defendant to set aside the contract, is, that it is against general or public policy.

* *Avery's Executors* v. *Jenkins*.

When

1803. dered and allowed; and thereupon the present writ of error was instituted.

The argument, *for the plaintiff in error*, turned upon this single proposition: "That as the transaction, on which the debt "arose, was prohibited by the law of *Pennsylvania*, the bill, or "note (being made the evidence of the debt) contravened the "policy of the law, and was, in its nature, a nullity: so that no "Court of *Pennsylvania* would sustain an action upon it; though "the statute did not expressly declare it to be void." 3 *State Laws*, 703. *Dall. edit. Cowp.* 39. 729. 734. 3 *Burr.* 1568. 1 *T. Rep.* 55. 1 *Vez.* 276. 3 *Burr.* 2234. *Yelv.* 197. 2 *Lev.* 174. 1 *P. Wms.* 185. 5 *T. Rep.* 120. *Doug.* 671. 3 *T. Rep.* 456. 4 *T. Rep.*

When the legislature pass a law upon a particular subject, it is the duty of the Court to see it carried into execution in the manner described in the law, and in *no other*. Thus, when the *English* parliament enacted, that whoever shall buy any goods, wares, &c. on the way to market, &c. shall be liable to fine and imprisonment, the Judges did not think proper to go a step beyond the law; though there cannot be the least doubt, that the crime of forestalling was repugnant to sound public policy, and against the policy of the law itself. The *contract* was admitted to be valid and binding between the parties, though they were punishable for their conduct.

It is readily acknowledged, that *every such contract* and sale of land, with delivery of possession, is contrary to the *interests* of the commonwealth of *Pennsylvania*; and so is every forestalling *contract*, or sale of a pretended title, repugnant to the *interests* of *that* country, where the laws forbid such contracts, and inflict penalties on those who enter into them. The *law itself* supposes the contract to be injurious to the *interests* of the country, and against the policy of the law which forbids the act to be done. But, unless the law expressly destroys the contract, I do not conceive a Court of justice is authorised to do it, on the ground of its being against the good of the public. It would be an assumption of legislative power.

The 3d and last reason, for setting aside this contract is, that the consideration has failed. When we speak of the consideration of a contract failing, it is understood, that the bargain turns out different from what was expected. The rule is, where the party is deceived, or imposed upon, he is not obliged to pay his money. For example, if *A.* sell a *Susquehanna* title to *B.* who is ignorant of the total defect of such title; there is no doubt *B.* may avoid the sale, on the ground of want of consideration, and imposition. But that is not the case now before the Court. Here it is admitted that *Mitchell* knew of the intrusion law, and the circumstances of the dispute relative to titles in this county. *Mitchell*, therefore, bought with his eyes open, and *now* comes forward to be relieved from his *contract*. In such case what is the language of a Court of Chancery? If both parties *meant* what they *did*, and were *acquainted* with the whole circumstances of the bargain, and if neither was deceived, the agreement must stand.

The maxim of law is true, that where two persons engage in an illegal transaction, the condition of the defendant shall be preferred; but as this maxim supposes the *contract* to be illegal, it cannot apply here.

Upon the whole, gentlemen, if you are of opinion, that the defendant knew and was acquainted with every material circumstance relative to the bargain, it is your duty to make him pay the money, with the interest thereon; but if you are of opinion he was in any degree imposed upon, or purchased ignorantly, in that case you ought to find a verdict in his favour.

The jury retired a few minutes, and returned with a verdict in favour of the plaintiff, for the amount of the sum mentioned in the note, with interest.

466.

466. 5 *T. Rep.* 599. *Cowp.* 341. *Carth.* 252. *Cro. E.* 788. *Hob.* 165. *Esp.* 88. 2 *Wils.* 133. 32 *H.* 8. *c.* 9. *Moore*, 564. 1803.

For the defendant in error, his right to recover the debt was maintained on various grounds: 1st. Because the bill, or note, is good at common law. 2d. Because the drawer of the note, received a consideration for it. 3d. Because it was given without fraud, or imposition, under a knowledge of all the circumstances. 4th. Because it would be good even as a voluntary bond. 5th. Because it is not rendered void by any statute; the acts of assembly subjecting an intruder to indictment and eviction, but never, in any instance, declaring a contract for the land, or a security for the price, to be unlawful and void. 6th. That it is not against the policy of the law (as in the cases cited upon smuggling) to allow a recovery of the debt. 3 *State Laws*, 703. *Dall. edit.* 4 *Ibid.* 198. 1 *Burr.* 545. *Cro. J.* 643. 1 *Show.* 398. *Cowp.* 524. 650. 2 *Atk.* 251. 2 *Vez. jun.* 422. 1 *Wils.* 229. 4 *Burr.* 2069. 3 *T. Rep.* 418. 2 *Burr.* 1077. 3 *T. Rep.* 456. 6 *T. Rep.* 61. 7 *T. Rep.* 601. *Doug.* 670. *Bous. & Pull.* 3. *Esp.* 18.

After great consideration, the Judges delivered their opinions at large, *seriatim*, pronouncing the contract, on which the bill, or note, was given, to be unlawful, immoral, and against the public policy of the law. They, therefore, decided, that no Court of justice in *Pennsylvania* could lend its aid to effectuate such a contract; and, consequently, reversed the judgment of the Court of Common Pleas. (2)

Judgment reversed.

W. Tilghman, for the plaintiff in error.
Rawle, for the defendant in error.

Passmore *versus* Pettit and Bayard.

THIS case came before the Court, on exceptions to the report of referees, who had exercised the right of appointing an umpire, under the rule of reference. After argument by *M. Levy*, for the plaintiff, and by *M'Kean* and *Dallas*, for the defendants, the *Chief Justice* delivered the unanimous opinion of the Court, for setting aside the report, on the following grounds:

By the COURT: 1st. When an umpire is chosen by referees, he stands in the same situation, precisely, as the referees themselves, both with respect to powers to be exercised, and duties to be performed. He may examine, and he ought to examine,

(2) The same principle has been decided in *Maybin, surviving Partner, &c. v. Coulon*; and in *Duncanson* v. *M'Lure*; both cases of contravening the act of congress, for registering vessels of the *United States*.

the

1803. the witnesses, and the documents, for himself, in the presence of the parties, without relying solely upon the information or facts reported by the referees. This rule was settled in the case of *Falconer* v. *Montgomery*; (1) and it is highly important to the administration of justice, that it should be observed. It has not been observed upon the present occasion; and, therefore, the report cannot be confirmed.

2d. Again: it is essential to the fair and satisfactory investigation of facts, that an opportunity should be afforded to obtain and produce the necessary evidence, however distant the scene of the transaction may be. A Court of justice will always allow time, for the execution and return of a commission, when witnesses reside abroad. In the present case, the question turned upon the sea-worthiness of a ship; and time was asked by the defendants to produce testimony from *Halifax*, where she had undergone a survey and repairs. This was refused, without any reason to suppose, that the object in asking it was mere delay and vexation. The refusal has deprived the party of the means of defence before the referees; and we cannot think it just, to place him out of the reach of all remedy, by confirming the report.

3d. On the subject of the reference, all the testimony should be heard, all the documents should be seen, by both the parties, in the presence of the referees. But it appears, that a paper, or *ex parte* affidavit, was produced before the referees and umpire, respecting the sea-worthiness of the ship (the very gist of the controversy) which the defendants never had an opportunity of reading, or examining. The referees and umpire are, undoubtedly, honest men; but they have erred in judgment; and their errors cannot be sanctioned, by an affirmance of the report, which their errors alone may have produced.

The report was, accordingly, set aside, and the judgment entered upon it, opened.

Bell *versus* Beveridge.

THIS was an action upon an open policy, dated the 10th of *March* 1793, on goods on board the *Andrew*, capt. *Macken*, bound from *Charleston* to *Amsterdam*. The ship, sailing on the voyage insured, was captured, on the 11th of *April* 1793, by a *French* privateer, and carried into *L'Orient*, where, after a few days detention, she was acquitted and restored. On the 26th of *April* 1793, however, the *French* government seized the cargo, for public use, promising to pay a liberal fixed price for it to the owners; but, after repeated solicitations, the consignee, in 1796,

(2) See *ante*, p. 232.

abandoned

abandoned the hope of seeing a performance of the promise, and returned to *America*. It appeared, on the trial of the cause, that the captain's protest, dated the 17th of *May* 1793, had been transmitted to the owners of the ship, in *Philadelphia*, under cover of a letter from *Amsterdam*, dated the 17th of *May* 1793; and the notice of the capture was given by them to the plaintiff, at least, as early as the month of *August* 1793. The yellow fever soon afterwards made its appearance in the city; and the plaintiff retired, with his family, into the country, on the 10th of *September*; but, in common with the rest of the citizens, he returned, after the calamity had ceased, about the 19th of *November*; and then went on a journey of business to *South Carolina*. It was not, however, until the 21st of *January* 1794, that he intimated to the underwriters an intention of abandonment; and, even then, he did not directly abandon, but only stated, in a letter, "that *he meant* to abandon." 1803.

The general question was, whether the abandonment, had been made in due season, to entitle the plaintiff, in this case, to recover for a total loss?

The defendant contended, that the words of the letter from the plaintiff, did not amount to an actual abandonment; but only imported an intention to abandon; that by such equivocal language, he was enabled to take for himself all the chances of an advantageous settlement in *France*: while the defendant was not empowered to pursue the property on account of the underwriters; that, independent of the ambiguity of the letter, intimating his intention to abandon, the abandonment was not made in a reasonable time, on the 21st of *January* 1794, notice of the loss having been received in *August* 1793; and that the excuse of the yellow fever, though it would apply to a personal interview, would not apply to a communication by writing. *Park*, 161, 2. 2 *Dall. Rep.* 284. 1 *Burr.* 349. 2 *Burr.* 697. 5 *Burr.* 1241. 3 *Atk.* 195. 2 *Burr.* 683. 2 *Burr.* 1198. 1214. *Doug.* 219. 1 *T. Rep.* 608. 1 *Esp. N. P. Rep.* 237. *Park*, 192. 2 *Mag.* 175. 416. *Park*, 92. 82. 81. (*a*) 172.

The plaintiff's counsel insisted, that under the peculiar circumstances of the case, the abandonment was made in due season; and that the terms of the abandonment were sufficiently positive.

The COURT, in the charge to the jury, stated, that no particular form of words was necessary to constitute an abandonment; that by declaring he meant to abandon, the plaintiff had made his election, and could never afterwards retract. That an abandonment must be made within a reasonable time; but that what constituted a reasonable time, was a question of fact, depending upon the relative situation of the parties, the time, and the place,

1803. after notice to the assured of the loss; and that, in the present case, there did not appear to have been any design to waive the right of abandonment, though its exercise was suspended by a public calamity, and other fortuitous occurrences.

Upon the whole, the opinion of the Court was in favour of the plaintiff, and the Jury gave a verdict accordingly.

Kingston *versus* Girard.

CASE, on a policy of insurance, to recover for a total loss, by capture. On the trial of the cause two points of defence were urged: 1st. That there had been a deviation; inasmuch as the vessel *traded* at the port to which she was carried by the captor. *Park*, 311, 312, 313. 295. 2d. That the extra expenses for wages, provisions, &c. during a capture and detention, were not a subject of general average; but a charge on the freight. *Park*, 54, 55. *Abb.* 285. 3. 1 *East*, 220. *Jones et al.* v. *The Insurance Company of North America.* (1).

It was admitted, by the plaintiff's counsel, that after the vessel was carried into the port of the captor, and before she was liberated, the extra-expenses were not a subject of general average; but, they insisted, that the expenses, subsequent to the liberation, were general average. *Park*, 54. 2 *Marshal*, 462. 1. 4.

By the COURT: If the vessel, after her release, remained at *Martinique*, to which she was carried by the captor, longer than was necessary to prepare for her voyage, and for the purpose of trading, it was a deviation; and the policy is void.

Whether the extraordinary expense incurred for seamen's wages, provisions, &c. during the detention of the vessel, upon a capture as prize, is a subject of general average, forms an important question. In the case of *Jones et al.* v. *The Insurance Company of North-America*, we decided, unanimously (and our opinion is strengthened by mature reflection) that such expenses, during an embargo in a foreign port, in the course of the voyage insured, are not general average, but a charge upon the freight, for which the underwriters upon the freight alone, must furnish an indemnity. We think, that the same principle embraces the case of detention for the purposes of a quarantine. In the case of detention, by capture as prize, there is not, however, any direct authority to decide the responsibility; and the principle of the other cases, does not embrace it. Elementary writers, *Beawes* and *Magens*, differ in opinion. It is, upon the whole, a safe, and the best, rule, to consider, whether the expence is incurred, for the general benefit of all the parties interested, in

(1) Since reported, *ante p.* 246.

ship,

ship, cargo, and freight. If it is, then all the parties should contribute to defray it. If it is not (as in the cases of embargo and quarantine, where the delay and expense are submitted to, merely that the vessel may earn her freight) then, the party who alone enjoys the benefit, should alone sustain the loss. 1803.

Lewis and *Hare*, for the plaintiff.
Ingersoll and *Rawle*, for the defendant.

M'Fadden *versus* Parker *et al.*

THIS was an action brought against *Parker* and *Wharton*, the indorsers of a promissory note, instituted at the same time, that an action was brought against *George Eddie*, the drawer of the note. There had been a trial, and verdict for the plaintiff, in *December* term 1801, subject to the opinion of the Court upon a case stated, involving two questions: 1st. Whether a plea *puis darein continuance*, had not been entered too late by the defendants? And 2d. Whether the new matter pleaded, was sufficient to bar the plaintiff's recovery? After some argument on the case, at *December* term 1802, the parties made the following arrangement:

"That the judgment shall remain as a security, and an issue "be formed and tried under this agreement. That the defendants "be permitted to enter, at this time, a plea *puis darein continu-* "*ance*, with like effect, as if it had been entered at the day "given for their next appearance, after the new matter occurred. "That the plaintiff be allowed to give evidence of all facts and "circumstances to show, that the new matter pleaded ought not "to operate as a discharge of the defendants. That the de- "fendants be allowed to give evidence of all facts and cir- "cumstances to repel such evidence, on the part of the plaintiff, "to show that such new matter ought to operate in their dis- "charge; and to establish that the plaintiff has received actual "value, or security, for the debt, from the drawer of the note. "And that it be admitted, on the trial, that notice, in due form "of law, was given to the defendants, by the plaintiff, of the "non-payment of the note, on which the suit is founded."

Under this agreement, the defendants relinquished all former pleas, and entered *puis darien continuance*, the plea of payment, with leave to give the special matter in evidence.

On the trial of the cause, it appeared, that a *testatum ca. sa.* had issued into *Northampton* county, returnable to *December* term 1797, in the case of *M'Fadden* v. *Eddie*, upon which the defendant was arrested; that, while he was in custody, he gave a bond and warrant of attorney to confess judgment to the plaintiff,

1803. tiff, intending that the judgment should operate upon lands which he claimed in *Northampton* county, but which eventually proved to be no security, though taken in execution and offered for sale, on a *venditioni exponas;* and that, on the 29th of *November* 1797, the plaintiff wrote to the sheriff in the following terms: "Sir, I request and desire that you discharge the defendant, in the above writ mentioned; he having satisfied me of the debt, interest, and costs;" and that the sheriff thereupon returned the writ, "C. C. Afterwards discharged from execution, by order of the plaintiff."

The defence was placed on two grounds: 1st. That the holder's acceptance of a security from the drawer, in satisfaction, was a release of all the parties to the note; however inadequate the security accepted; and however defective the title to the property might afterwards appear. 1 *Stra.* 691. *Noy*, 140. 3 *Mod.* 86. 2 *Show.* 481. *Doug.* 236, 7. 250. 2 *Vez.* 540. 4 *Vez.* 824. 832, 3. *Ambl.* 79. 1 *Dall. Rep.* 254. 7 *T. Rep.* 421. 2d. That the release of one of two joint debtors, is the release of both; and the discharge of a defendant from a *ca. sa.* is tantamount to a payment or extinguishment of the debt. 4 *Burr.* 2482. 3 *Wils.* 14. 1 *T. Rep.* 557. 6 *T. Rep.* 525. 2 *Bl. Rep.* 1237. (1) 1 *Bous. & Pull.* 665. 2 *Bous. & Pull.* 61.

For the plaintiff it was premised, that there was no negligence imputable to him; that notice of the non-payment was regularly given before any indulgence was shown to the drawer of the note; and that every arrangement with the drawer was, in fact, for the benefit of the indorsor. It was then contended, 1st. That considering the relative situation of the parties, before the discharge from the *ca. sa.* the holder's acceptance of a security from the drawer, was not a bar to his remedy against the indorsor. And 2dly. That whatever might be the operation of the discharge from the *ca. sa.* as to the drawer, it did not extinguish the debt as to the indorsor.

1st. The drawer and indorsor of a promissory note, are not joint debtors; but are indebted to the holder on separate and distinct contracts; the former being bound to pay at all events; the latter only in case of the drawer's default, and of the holder's giving due notice of it, and pursuing a recovery against the drawer with reasonable diligence. *Kyd*, 22. 72, 3. 74, 75. 110. 76. Upon notice of the drawer's default, the indorsor becomes an absolute debtor, not a surety; and it is a duty immediately to pay. If he delays payment, it is a wrong; and he shall not afterwards take advantage of it. The holder is not bound to

(1) The case in 2 *Bl. Rep.* 1237. was cited by the defendant's counsel, as the single authority in opposition to their doctrine; but condemned as a bad precedent, in the worst of Sir *William Blackstone's* works.

pursue

pursue the drawer; but, after notice to the indorsor, he may do every thing he can to get, or to secure, his money from the drawer: provided he does not thereby deprive the indorsor of his remedy over. 1 *Bous. & Pull.* 655. *Bull. N. P.* 271. 1803.

2d. As no misconduct is imputable to the plaintiff, neither can it be said, that he has received an actual payment, or satisfaction, for the debt. The bond and warrant of attorney were obviously taken as a collateral security; and not with an intention to release the obligation of either of the parties to the note. *Doug.* 237. But even upon the strictest application of the rule of law, the arrest of one man upon a *ca. sa.* cannot be deemed a satisfaction for another man's debt, The drawer and the indorsor cannot (like co-obligors or partners) be sued in the same action; and when judgments are obtained against them in separate actions, a *fi. fa.* may issue on one judgment, and a *ca. sa.* upon the other. All the authorities cited for the defendants, are in cases of a joint *ca. sa.* But the authorities for the plaintiff are express, that it must be an actual, not a constructive, payment by one debtor, to discharge another debtor, upon a distinct contract, though for the same sum. And the release of the debtor in execution, however it may affect the right and the remedy of the plaintiff in the execution, cannot affect the right or the remedy of any other person. *Tidd.* 412. *Hob.* 59, 60, 61. 1 *Wils.* 46. 2 *Bl. Rep.* 1235. 4 *T. Rep.* 825. Thus, *M'Fadden*, the holder of the note, may sue *Parker* and *Wharton*, the indorsors; and they, having paid the note, may sue *Eddie*, notwithstanding his discharge from the *ca. sa.*

The COURT, in the charge, left it to the jury to consider, whether the plaintiff had accepted the bond and warrant of attorney, in satisfaction of the debt, due upon the note; and thereupon intended to release both the indorsors and the drawer.

The jury, upon this charge, gave the plaintiff a verdict for the amount of the note, with interest.

But on a motion, for a new trial, the counsel of the defendants, urged, that the extinguishment of the debt, by the discharge of *Eddie* from the *ca. sa.* was a point of law clearly in their favour; on which they cited additional authorities, and reasoned more at large, than at the trial; that the agreement under which the issue was formed, did not waive the benefit of the strict rule of law; and that the court, instead of leaving the case to the jury, ought to have charged expressly in favour of the defendants. 3 *Bl. Com.* 390. 2 *T. Rep.* 120.

The counsel for the plaintiff answered, that the verdict was conformable to the real justice of the case; that the agreement, under which the issue was formed, was meant to bring the case before

1803. before the jury upon its equitable circumstances; that the Court fairly left the decision to the jury, upon the genuine principles of the agreement. *Doug.* 248. (236.) 250. 2 *Salk.* 575. 8 *T. Rep.* 168. 2 *T. Rep.* 4. 4 *T. Rep.* 468. 1 *Salk.* 116. 2 *Salk.* 646. and that even on the strict point of law, the plaintiff was entitled to a verdict; none of the opposite cases applying to separate debtors, on distinct contracts, who could not be sued as joint debtors.

By the COURT. The case has been well argued at the bar; and the Judges have enjoyed an opportunity to consider it, with more deliberation, than could be bestowed upon it, during the trial.

We are now convinced, that the principal point of law, should have been differently presented to the jury. It is clearly in favour of the defendants; and ought to have been so stated in the charge.

The construction of the agreement, however, is a distinct subject for consideration. The counsel, who drew the agreement, are essentially at variance upon its design and meaning; and the Court have not formed (nor is it necessary, at this time, that we should form) a decided opinion upon the subject. The *intention* of the parties to the instrument, will be, properly, left to the jury on the new trial; which, for the reason already assigned, it is our duty to award.

New trial awarded.

For the plaintiff, *Ingersoll* and *Dallas.*
For the defendants, *E. Tilghman* and *Hallowell.*

SUPREME COURT

OF

PENNSYLVANIA.

September Term 1803.

Sharpless *versus* Welsh *et al.*

SCIRE FACIAS against *John Welsh*, *Redman Byrne*, and the Bank of the *United States*, garnishees in a foreign attachment, issued by the plaintiff against *M. Moore*, of *Charleston*. The facts were these: *Moore*, being indebted to several persons in *Philadelphia*, remitted to *Redman Byrne*, a bill of exchange, dated the 13th of *November* 1800, drawn by *Joseph Byrne*, in favour of *Redman Byrne*, on *John Welsh*, at 60 days sight, for 1700 dollars; saying, in the letter that inclosed the bill, "I will "send the duplicate, in a few days, with directions what to do "with it." Accordingly, on the 22d of *November*, he wrote again to *Byrne*, ordering the following disposition of the bill:

"To *Martin Bernard* . . . . . 70*l.*
"To *Moore*, surviving partner of *Goldthwaite* . 29 Dollars.
"To *Jesse Sharpless* . . . . . 400 Dollars.
"To *M. Shields* . . . . . 300 Dollars.
"To *Robert Campbell* 400
"The balance to be divided equally between Mr. *Carr* and "*M'Goffin*."

Soon after the receipt of his letter, *Byrne* showed it to the plaintiff, and, also, to *John Shields*; told each of them of the appropriations; and promised to pay each the sum specified, when the cash should be received. And, on the 26th of *December* 1800, he wrote to *Moore*, that the bill "should be disposed of, "as his last letter directed." Subsequent to these communications, the plaintiff issued a foreign attachment, on which the present *scire facias* is grounded. *Byrne* informed *Moore*, of the occurrence, and called for instructions, on the 8th of *January* 1801;

1803. 1801; and on the 6th of *February* following, *Moore* answered, "I would rather, if by any means you could have it done, that "*Sharpless* should be got to put up with 8 or 900 dollars; and "the rest to be paid to the other people mentioned, as far as it "will go." But *Byrne*, conceiving himself bound to pay, according to the first appropriation, did not mention this proposition to *Sharpless*. In the meantime, the bill of exchange, which had been accepted on the 28th of *November*, was regularly protested for non-payment; *Welsh* assigning the attachment, as the cause of his refusal to pay.

On the trial of the cause, it was contended, *for the plaintiff*, that the property in the bill continued to be *Moore's*, at the time of the attachment; and that the creditors had acquired no lien upon it. 4 *Burr.* 2174. The letter of appropriation, is nothing more than a private order, to pay the money, when it was received; and *Moore* had a power to revoke, or alter it (as, in fact, he did, in his letter of the 6th of *February*) at any time before actual payment to the creditors.

But it was insisted, by the counsel *for the defendants*, that the letter of the 22d of *November*, amounted to an irrevocable appropriation and transfer of the fund; that *Byrne* became a trustee, for the creditors named in the letter; and that the trust fund was not liable to a foreign attachment. *Ambl.* 297. 1 *Atk.* 124. 2 *Atk.* 207. 1 *F. Vez.* 280. 1 *Vez.* 331, 2. 1 *East.* 550. 5 *T. Rep.* 215. 494.

By the COURT: (1) The plaintiff had a legal right to institute the attachment, which cannot be divested, by any irregular attempts to obtain a preference, from the trustee himself. The only question is, whether the fund attached, can be regarded, under the circumstances of this case, as the property of *Moore*?

The facts are few, but powerful. *Moore* remits the bill to *Byrne*, with express directions to apply the money, to the payment of specific creditors in *Philadelphia;* and *Byrne* undertakes to do so. Independent of the communication to the plaintiff, *Byrne* mentioned the general appropriation to *Shields*, with a direct and positive promise, to pay *Shields* his proportion of the money.

Under these circumstances, it is clear, that there could be no revocation of the appropriation, in favour of *Shields;* to whom *Byrne* himself had become responsible: but the doubt arises, as to the situation of those creditors, who had received no intimation of the remittance. If, indeed, no notice had been given to *any* of the creditors, we do not think that any of the creditors

(1) The cause was tried at *Nisi Prius*, *Philadelphia*, on the 16th of *June* 1803, before SMITH and BRACKENRIDGE, *Justices*.

would

would have acquired a vested interest in the fund, by the terms of the correspondence between *Moore* and *Byrne*. But it is a material fact, for the consideration of the jury, that the plaintiff received information, not only of his own apportionment, but of the distributive shares of all the creditors; and that he never objected to this appropriation of the fund, until he issued his attachment. If the jury shall think, from this fact, that the plaintiff ratified, or acquiesced, in the distributive appropriation; the law will not permit him, afterwards to monopolize the fund, in the way, that the present suit contemplates. 1803.

BRACKENRIDGE, *Justice*. The equity of the case is strongly in favour of the defendants; but I find it difficult to surmount the strict rules of law, as to those creditors, who, receiving no notice, acquired no right. The creditors who received notice, and assented to the appropriation, had clearly a vested interest. But, I incline to think, the law in favour of the creditors stops there; unless the fact is sufficiently ascertained, to satisfy the jury, that the plaintiff, by his conduct, approved and assented to the whole appropriation, after he was fully apprised of it. That fact, the important one in the cause, if found affirmatively, by the jury, must be decisive in favour of the defendants.

On the day, succeeding that, upon which the charge was delivered, the jury returned to the bar, and declared, that they could not agree upon a verdict; proposing, at the same time, several legal questions, for the solution of the Court.

But SMITH, *Justice*, observed, that it would, probably, extricate the jury from their embarrassment, as well as relieve his own mind, to inform them, that since the adjournment, he had entirely changed his opinion, upon the principal legal point in the cause. He said, that he had always thought it more honourable to retract an erroneous opinion, when the error was discovered, than to persist in it, upon the suggestions of a false and pernicious pride. He then declared, that on full reflection and research, during the recess, he had been convinced, that from the time of receiving *Moore's* letter, ordering specific payments, to the enumerated creditors, *Byrne* became a trustee for those creditors; and that the creditors thereupon acquired such an interest in the trust fund, as could not be divested, or affected by the plaintiff's attachment. (1).

The jury, having again retired, soon agreed upon a verdict, in favour of the plaintiff, for 400 dollars; being the sum to which he was entitled by the original appropriation of the bill of exchange.

(1) BRACKENRIDGE, *Justice*, expressed no opinion upon this occasion; but seemed, silently, to assent to the statement now made by Judge SMITH.

1803.

The Commonwealth *versus* Baynton *et al.*

DEBT, on the official bond of *Peter Baynton*, as state treasurer, dated the 11th of *January* 1797, against him, and his sureties, *David Lenox*, *William Hall*, and *Joseph Bullock*. It was admitted, that there was a considerable balance due from *Baynton* to the state; but the defence taken for *his sureties* was on two distinct grounds: 1st. That the treasurer is elected annually; he is required to give bond on every election; and that his sureties in the present bond, are only liable for any *deficit*, actually incurred, during the year, commencing in *January* 1797, and ending in *January* 1798. 2d. That by the conduct of the legislature, in frequent subsequent re-appointments of *Baynton*, as treasurer; and by the conduct of the accounting officers, who had the legal examination and controul of his accounts; the *sureties* were virtually discharged. On the *first* point, were cited, *Const. Penn. art.* 6. *s.* 5. 3 *vol. State Laws*, 221. 2 *Ibid.* 756. 2 *Saund.* 411. *Styl.* 18. *Al.* 10. *Park*, 277. *Leon.* 240. *Moor*, 126. 274. 2 *Vern.* 518. On the *second* point, there was a general reference to the Acts of Assembly, and to the public records, in relation to the state treasurer's accounts, and to the repeated elections of Mr. *Baynton;* and the following authorities were cited: *Co. Litt.* 206, 7. 1 *Roll. Abr.* 457. 463. 2 *Vez. jun.* 540. 4 *Vez.* 824. 2 *P. Wms.* 542. 1 *T. Rep.* 291. 2 *Bous. & Pull.* 62. 3 *Br. Ch.* 1. 3 *State Laws*, 132. *Comb.* 464. *Vern.* 24. 2 *Brownl.* 107. 12 *Mod.* 559.

On the part of *the Commonwealth*, a strict scrutiny was made into the bank deposits and drafts of *Baynton*, to ascertain the period when the deficit arose, and its subsequent fluctuations: And it was contended, 1st. That from the nature and extent of the obligation, the sureties were bound to indemnify the state, unless they could show, that there was an express release; that the recovery was barred by lapse of time; or that a settlement with the principal, had extinguished the claim upon the sureties. 2d. That the indemnity of the bond extended to the general duty of the treasurer, as well as to his fidelity in pecuniary transactions; and as soon as he ceased to make the bank of *Pennsylvania* the depositary of the public money; or as soon as a false estimate of accounts was exhibited; the bond was forfeited. 3d. That from the very nature of the indemnity, its obligation is co-extensive with the continuance of the *person*, in the office; and the only questions are, whether the sureties could so engage? and whether they have so engaged? That on the facts (even supposing the indemnity of the bond to be limited, by an implied connexion with the annual tenure of the office) there was a deficit of inactive public money, at the end of the

the year 1798; not found in the bank, nor accounted for in any public deposit, or application. On these several points, the following authorities were cited: 3 *State Laws*, 132. 4 *Ibid.* 301. 4 *Vez. j.* 829. *Sayre*, 115. 2 *P. Wms.* 287. 1 *Bous. & Pull.* 419. 422, 3 *State Laws*, 222. *s.* 9, 10. 2 *State Laws*, 753. *s.* 6, 7. 6 *State Laws*, 490. 3 *Dall. Rep.* 500. 2 *Saund.* 411. 1 *T. Rep.* 295. 293. *Bumb.* 275. 337. *Hardr.* 424. 3 *Leon.* 240. *Moor*, 126. 274. 2 *Cha. Ca.* 84. *Show.* 216. 1803.

The COURT, in the charge, directed the jury, in point of law, to confine the responsibility of the sureties, to a deficit occurring during the year, ensuing the date of the bond. But if, from the evidence, they were satisfied, that there was a deficit, during that year, they thought, that a verdict should be in favour of the commonwealth for the amount.

Verdict for the defendants. (1)

M'Kean, (attorney-general) and *Dallas* for the commonwealth. *Rawle*, for the defendants.

Watson *et al. versus* The Insurance Company of North America.

THIS was an action on a policy of insurance, in which the declaration was for a total loss. On the trial, it appeared, that the assured had demanded payment of a total loss, which the defendants refused to pay; but there was no evidence of an actual abandonment, or offer to abandon, to the underwriters, before the suit was instituted; and the proof was of a loss in its nature total. The jury gave a verdict, in favour of the plaintiff, finding damages, as for a partial loss; subject to the opinion of the Court, upon a motion for a new trial, to consider two points reserved: 1st. Whether a previous abandonment, or offer to abandon, was indispensably necessary, to enable the plaintiff to recover in this suit? And, 2d. Whether, on a declaration for a total loss, and proof of a loss in its nature total, the jury can give damages for less than a total loss?

After argument by *M. Levy* and *Lewis*, for the plaintiffs; and by *Moylan*, *E. Tilghman*, and *Ingersoll*, for the defendants, the COURT (consisting of SHIPPEN, *Chief Justice*, and YEATES and SMITH, *Justices*) were of opinion, that the jury might find damages for a partial loss; although the declaration claimed for a total loss; and although there was no proof of an actual abandonment, or an offer to abandon, to the underwriters.

(1) It may be proper to observe, that Mr. *Baynton* did not appear, nor take defence, in this suit: the proceedings to recover from him having been instituted on the settlement of the comptroller.

But

1803. But BRACKENRIDGE, *Justice*, said, that he thought there was sufficient evidence at the trial, to induce the jury to find an abandonment; and, on that ground alone, he concurred, in refusing a new trial. For, the general ground, on which the opinion of the rest of the Court was founded, did not appear to him so conclusive, and so satisfactory, as it did to them.

Motion for a new trial refused: and judgment rendered on the verdict for the plaintiffs.

Williams *et al.* Executors of Fisher, *versus* Paschall *et al.*

DEBT on an arbitration bond. Upon oyer of the bond and condition, it appeared, that the defendants, as heirs of *Jonathan Paschall*, had entered into a bond, dated the 14th of *September* 1796, in the penal sum of 500*l.*, conditioned for the performance of an award, by arbitrators, mutually named by them and the plaintiffs, to be made "of and concerning all matters in controversy between them respecting a certain bond given by the said "*Jonathan Paschall* to the said *James Fisher* (the testator) and "respecting all accounts, which they the said heirs of *Jonathan* "*Paschall* may exhibit as payments in discharge of the said bond, "and of and concerning all and all manner of actions, &c. &c. respecting the said bond and accounts, &c." The award, which was set forth on the record, after reciting the bond and submission, concludes that "the arbitrators are of opinion, that the defendants "are justly indebted to the plaintiffs in the sum of 310*l.* 11*s.* 4½*d.*" The defendants pleaded specially, "that the plaintiffs ought not "to have and maintain their action aforesaid against them, because they say, that the said arbitrators, in making the said "award, at the time and place aforesaid, from a mere inadvertancy, error, mistake, and misapprehension, of the law and "right and justice of the case, calculated, allowed, and added, "the full interest of six per cent. per annum, on the whole "amount of the principal sum mentioned in the bond, submitted "to their arbitrament, for a long time, that is to say, for twenty-six years and upwards; although, within the same time, many "payments and advances had been made by these defendants, "and on their account, to the said *James Fisher* in his lifetime, "and, after his decease, to the said plaintiffs, on account of the "said bond, to the full amount of the principal and interest due "on the said bond; but on which payments and advances, from "a mere mistake, error, and misapprehension of the law and "right and justice of the case, no interest was calculated, or allowed, by the said arbitrators, in making and forming their "said award: nor were the said payments and advances deducted, as by law and right they ought to have been, from the monies "due

"due on the said bond, at the respective times, when such pay- 1803.
"ments and advances were made, or at any time, or times, be-
"fore publishing the said award. And this the said defendants
"are ready to verify, &c."

To this plea, the plaintiffs demurred; and it was agreed, that the Court should decide, 1st. Whether the award was, in itself, good. 2d. Whether, if the award was good, the plea could be sustained?

E. Tilghman, in support of the demurrer, contended, that the award was good in itself; and that the plea, which entered into the merits of the original controversy submitted to the arbitrators, was bad. 1 *Vez. jr.* 365.

Lewis, for the defendant, admitted, that in a common law court in *England*, the plea would be bad; but he insisted, that any plea, which contained matter proper for a bill in equity there, would here be sustained in a Court of common law, from the necessity produced by the want of a Court of equity. If, therefore, the award is bad on the face of it, the form of the plea is immaterial. And it has been decided in *Pennsylvania*, that an award is not good, unless it determines the whole matter in dispute, and submitted; nor if it exceeds the subject submitted, unless the excess can be separated and rejected; nor if it decides matters submitted on one side, without deciding the matters submitted on the other side. *Huff* v. *Parker*, *Comp. Pl. Phil. Removed into the Supreme Court by writ of error*, *April* 1787. If, in short, the arbitrators mistake in a plain point of law, their award ought to be set aside. 3 *P. Wms.* 362. 3 *Atk.* 486. 494. 529. And, in the present instance, the allowance of interest on the one side, and the rejection of it upon the other, is a plain error in law and justice.

Rawle, in reply, having cited 1 *Burr.* 277. was stopped by the Court.

SHIPPEN, *Chief Justice*. We are, unanimously, and clearly, of opinion, that the award is good, in itself; and that the plea is bad. As to the equitable power of the Court, we are often, for the sake of right, obliged to introduce a chancery relief; but it is only in cases, where we can, by such an interference, do justice to both sides; never to aid one man at the expense of another. If, too, relief is granted in the case of an award, it must be on a plain error in law, or fact, specifically set forth; which is not the present case.

Judgment for the plaintiff.

SUPREME COURT

OF

PENNSYLVANIA.

December Term 1803.

Crawford *et al. versus* Willing *et al.*

THIS was an action of account render, brought by *Crawford* and Co. of *Rotterdam* against *Willing* and *Morris* of *Philadelphia*. There was a judgment *quod computent*, under which the auditors reported, "that the sum of 1658*l.* 11*s.* 8*d.* *Pennsylvania* currency is due from the defendants to the plaintiffs; but not being agreed, with respect to an allowance of interest, they submit that point to the Court." The plaintiffs thereupon filed a *suggestion*, "that the defendants ought to be charged 3770*l.* 15*s.* for interest, on the several sums of money by them accounted for, in their account, mentioned in the report of the auditors; and that the plaintiffs are entitled to have and recover from the defendants the said sum of 3770*l.* 15*s.* as well as the principal." To this suggestion the defendants *pleaded*, 1st. "That they ought not to be charged with the said sum of 3770*l.* 15*s.* for interest, &c. and that the plaintiffs are not justly entitled to have and recover the same, &c. because, they say, that the same, or any part thereof, is not justly due from the defendants to the plaintiffs: and this they pray may be inquired, &c." 2d. Payment of the principal sum. 3d. The bankruptcy and certificate of *Morris*, one of the defendants. Issue was joined on the first plea; and the second and third were confessed.

On the evidence, it appeared, that the transactions on which the debt to the plaintiffs was founded, occurred before the year 1775; that during the years 1775 and 1776, and during several years after the war, the debt was repeatedly acknowledged, and a remittance of the amount promised, in a correspondence between the plaintiffs and *Morris*, as the acting partner of the defendants; that

that the partnership commenced by articles dated the 1st of *January* 1773, and continued for five years; that the partnership was renewed, taking *Swanwick* in as a partner in the year 1783; that partial remittances were made by *Morris* in the year 1786, which reduced the balance of the principal sum to the amount reported by the auditors; and that *Willing* never knew of the plaintiff's demand, until the present suit was amicably instituted by agreement with *Morris* alone, dated the 4th of *August* 1798. 1803.

E. Tilghman and *Ingersoll*, for the plaintiffs, proposed to inquire, 1st. Whether considered as a commercial case, generally, it is not a case in which interest ought to be allowed? 2d. Whether the special circumstances of the case, exclude the claim of interest, with reference to the law of partnership? 3d. Whether the case is affected by the existence and operation of the revolutionary war?

1st. It is true, that, in the old books, the claim of interest upon simple contract debts, is treated with great rigour, and allowed only in the case of a note; but the law, gradually accommodating itself to common sense and common honesty, is at length settled, that for money lent; for liquidated balances: nay for goods sold and delivered, where the usual credit is expired; for money detained, which ought to be paid over, and during the continuance, as well as before the commencement of a suit; the creditor shall be entitled to interest. 1 *Dall. Rep.* 349. 1 *Fr. Vezey*, 63. *Rep. temp. Hard.* (*Ridgway*) 286. 1 *Vez.* 310. 3 *Br. Ch.* 436. *Doug.* 361. And, under circumstances of vexatious delay, interest may be recovered, even beyond the amount of the principal. *Atk.* 80. 2 *Vez. j.* 300.

2d. The debt was contracted, the correspondence was carried on, during the existence of the partnership, between *Willing* and *Morris*. Each partner was, therefore, liable, not as a surety, but as a principal, for the lawful contracts and transactions of the other, in relation to their joint business. 1 *Wils.* 682. 3 *F. Vez.* 277. *Bankrupt Act of Congress*, *s.* 34. *Doug.* 629.

3d. The Courts of *Pennsylvania* (differing in their view of the subject from the federal Courts) have made an abatement of interest during the continuance of the revolutionary war (a period computed at seven years and a half) in suits brought by *British* creditors, against *American* citizens, the immediate parties to the war: but there is neither law, justice, nor precedent in any Court, for applying the rule to suits brought by the citizens of a neutral, or friendly, nation: And as to the practicability, as well as the lawfulness, of a remittance, it is notorious, that the intercourse between the *United States* and *Holland* was never suspended, at any period of the contest.

Lewis, for the defendants, stated his general position to be, that interest is not due of course, upon an account current; or an unliquidated

1803. liquidated debt. 1 *Wils.* 376. 3 *Wils.* 205. 1 *Dall.* 349. *Doug.* 361. 1 *Dall.* 265. 3 *Dall.* 313. 1 *P. Wms.* 376. 3 *P. Wms.* 205. *Doug.* 361. *Durden* v. *Gaskill*; and that the peculiar circumstances of the present case, will not warrant a departure from the general rule. The cases cited for the plaintiffs are, indeed, inapplicable to the real point at issue. Thus, 1 *Dall. Rep.* 349, was the case of a single sum of money, received at one time, by the defendant from the plaintiff's agent; not the case of an open, running, account. The cases in 1 *F. Vez.* 63, and *Ridgw.* 286. go no farther than to show, that when a sum is ascertained to be due, by settlement, or liquidation, of accounts, interest begins to run. The case in 1 *Vez.* 310, contains, indeed, the strong expression, that interest follows the principal, as a shadow does the substance; but the expression must be applied to the subject before the Court; which was a legacy, for the education of a child, bearing interest from the very nature of the bequest. And the case in 1 *Wils.* 682. arose upon a joint and several *bond.*

To the general position, however, that interest is not payable, in cases of account current, and other simple contract debts, *Lewis* admitted there were various exceptions: 1st. Where there is an express contract to pay interest. 2d. Where the accounts have been settled, and a liquidated balance ascertained. 3d. Where a debt consists of a single sum of money, and no account current has been raised between the creditor and debtor. 4th. Where there has been an unreasonable detention of money, after a demand of payment, or a refusal to come to a settlement. But, he insisted, that there was no authority, in any case, to justify a verdict for interest, beyond the amount of the principal; not even upon a bond, if the creditor has neglected to demand payment for several years. 14 *Vin. Abr.* 460.

But, adverting to the peculiar circumstances of the case, *Lewis* contended, 1st. That there was a wide distinction between the responsibility of *Morris*, and that of *Willing*: the correspondence being exclusively with the former, and no demand of payment, no notice of the claim, to the latter, till 1798, long after the dissolution of the partnership. The act, or assumption, of one partner, to bind the company, must take place during the continuance of the partnership; and here the only promise made by *Morris*, during the partnership, was in the year 1775; before the money was received, and merely importing, that the defendants would remit it, when it was collected; which, surely, is no foundation for the charge of interest. 3 *Bac. Abr.* 517. 2 *Ventr.* 151. So far, therefore, as respects *Willing*, it is a stale demand, against which every presumption will be made. *Cowp.* 215. 1 *Wils.* 742. 1 *Atk.* 493. *Gilb. Eq.* 224. 2d. That the operations of the war, and the high state of exchange, afford a justification for not remitting till the peace of 1783; and after that epoch, no demand was made upon *Willing*, till the suit was brought.

By

By the COURT: (1) The auditors have ascertained the principal sum, that is due from the defendants to the plaintiffs; leaving to the Court the question of interest. The only point now to be decided, therefore, is whether any, and what, interest, ought to be paid upon the debt so ascertained? 1803.

The inquiry has been naturally, and fairly, pursued, under the considerations suggested at the bar: 1st. Whether, on general principles, it is a case, in which interest can be allowed? 2d. Whether any circumstances, peculiar to the case, in relation to the parties, should prevent the allowance of interest here, in opposition to a general rule? 3d. Whether the effect of the revolutionary war was such, as to suspend the right to interest, for any, and for what, period?

1st. Whatever may have been the doctrine in former times, we have traced, with pleasure, the progress of improvement, upon the subject of interest, to the honest and rational rule, that, wherever one man retains the money of another, against his declared will, the legal compensation, for the use of money, shall be charged and allowed. From the single case of a promissory note, the instances, in which interest is allowed, have been so multiplied, year after year, that few remain to be added to the legal catalogue. In *Pennsylvania* the policy is older, and still, perhaps, more extensive, than it is in *England*. There, even at this day, an action must be brought upon a judgment, in order to recover interest upon it; but here, our act of assembly, so early as the year 1715, made the interest an inseparable incident of the judgment. For my own part, I am prepared to say, with the book cited, that interest ought to follow a debt, as the shadow does its substance. Even, in the case of goods sold and delivered, I would think it right to allow interest, as soon as the express, or the implied, term of credit had elapsed, and a demand of payment was made. (2)

In the present action, there can be no doubt, that the balance had long been ascertained and acknowledged. In *England*, it is the practice of merchants to balance their accounts annually; and, by that means, the interest of each year becomes principal, in the new account of the succeeding year. Without adopting that practice, it is clearly our opinion, that the defendants are liable for the interest actually claimed, unless some special reason exempts them from the general obligation of merchants.

(1) This cause was tried before SMITH, and BRACKENRIDGE, *Justices*; the CHIEF JUSTICE declining to sit, on account of his relationship to Mr. *Willing*; and YEATES, *Justice*, being absent, on account of indisposition. The charge was delivered by Judge SMITH.

(2) In the course of the trial, SMITH, *Justice*, declared, that the authority of 1 *Dall.* 265. (laying down the rule, that interest was not payable for goods sold and delivered) had been often overruled.

1803.

2d. The circumstances suggested, to distinguish the responsibility of Mr. *Willing*, from that of his partner, are not a sufficient legal, or equitable, answer, to the demand of the plaintiffs. In *Watson's* treatise, on the law of partnership, the cases on this point are collected and arranged. The result of the whole is, that, during the partnership, all the partners are answerable for the acts of each. It is no ground of discrimination in this respect, which partner actually received the funds; which was intrusted to transact the business, or which was ignorant of the state of the debit and credit, of the company books. If, indeed, a public notice is given by one partner, of the dissolution of a partnership; and creditors, unreasonably neglecting it, will place funds in the hands of the other partner, they must take the consequence of their own imprudence. But the present case is free from every embarrassment of this kind. The debt was contracted during the partnership; and all that was written about it, both before, and after, the termination of the partnership, was written by Mr. *Morris* alone, without any objection, on the part of Mr. *Willing*; whose conduct, on the contrary, gave reason to presume consent and approbation.

3d. Nor will the effect of the revolutionary war, furnish the defendants with a justification, or excuse, against the claim of interest. We all know the eminent services of Mr. *Morris* to his country; and the pre-eminent credit of the house of *Willing* and *Morris*, throughout the war. But these very advantages show, that the defendants, of all men, had it in their power to remit the funds, for the payment of their debts, due in neutral countries.

This, then, is our general position: the defendants are liable, for the payment of interest, from the time the money was in their hands, demanded and neglected to be paid, until the war; during the war, if remittances could safely be made; and (if they could not be safely made during the war) then from the peace of 1783, until the actual recovery of the principal.

Unless, upon the whole, the jury can discover some ground of excuse, which we have not been able to trace, the interest ought to be allowed, in justice to the plaintiffs: and, we will add, in justice to the commercial character of our country.

The jury found a verdict for the plaintiff, for 4422 dollars and 89 cents. (3)

(3) This sum, it is plain, was not equal to one half of the interest claimed (and the calculation of interest was in a mode favourable to the defendants) but it was exactly equal to the principal sum reported by the auditors. It is presumed, therefore, that the jury thought the interest ought not to be allowed beyond the principal.

Crammond

1803.

Crammond *et al.* Executors of Cay, *versus* The Bank of the United States.

THE following case was stated for the opinion of the Court:

"On the nineteenth day of *August* 1793, *David Cay* and *Andrew Clow*, who then carried on business under the firm of *Andrew Clow* and company, indorsed a note drawn by *Henry Darroch*, bearing that date, for the sum of eight hundred and fifty-two dollars and eighty-two cents; which note was discounted by the president, directors and company of the bank of the *United States*, defendants in this action, and the amount paid to the indorsors.

"Before the note became due the drawer, and both the indorsors, died of the yellow fever; and notice of non-payment was duly given to the executors of the surviving partner *David Cay*.

"On the eleventh of *April* 1793, *Andrew Clow* and *David Cay* laid a foreign attachment on the property of a certain *James Brown* in the hands of the defendants. Judgment was obtained in *December* term 1793, in the names of the present plaintiffs, as executors of *David Cay*, the surviving co-partner.

"A writ of inquiry has been issued and the sum of twenty five thousand five hundred and forty-three pounds, two shillings and three pence has been found due to the plaintiffs; judgment was thereupon entered in the usual form. A *scire facias* issued against the defendants as garnishees, in which, after the general proceedings stated on the record, there was a trial, on the 10th *September* 1801, when the jury found for the plaintiffs 3354 dollars; and on the same day, judgment *nisi* was entered.

"The defendants as garnishees of *James Brown* are in possession of thirteen shares of bank stock, and of the dividends thereon arising and accruing, since the first day of *July* 1801, which are subject to this attachment. And they have received payment of two hundred and eighty-four dollars, and twenty-seven cents, being a dividend of the estate of *Henry Darroch*, the drawer of the said note.

"The question for the opinion of the court is whether the defendants in this action, are entitled to set off against the demands of the plaintiffs in this action, the sum of $\$ 568\frac{44}{100}$ being the balance of the note unpaid?

After argument, by *E. Tilghman* and *Ingersoll*, for the plaintiffs; and by *Lewis* and *Rawle* for the defendants,

The COURT (absente SHIPPEN, *C. J.*) decided that the set-off was inadmissible.

M'Culloch,

1803.

M'Culloch, Administrator, &c. *versus* Young.

THIS was an action on the case, brought against the defendant, by *John M'Culloch*, as administrator of *Robert Parland*, under letters of administration granted by the Orphan's Court, and tested by "the register of wills for *Prince George* county," in the state of *Maryland*, on the 8th of *October* 1799, addressed to *John M'Culloch* of "*Alexandria*, in the state of *Virginia*."

The only controverted question in the cause, was submitted to the Court, all the judges being present: to wit; whether an action could be maintained in the Courts of *Pennsylvania*, under the authority of letters of administration granted in another state?

And after argument by *M. Levy*, for the plaintiff, and by *Hopkinson* for the defendant (in the course of which, 1 *Dall. Rep.* 456. 1 *State Laws*, 30. *Dall. edit.* were cited):

The COURT, adverting to the numerous instances, both since and before the revolution, in which such suits were maintained, unanimously pronounced,

Judgment for the plaintiff.

Commonwealth *versus* M'Kissick *et al.*

ON the 15th of *March* 1802, a rule was obtained upon the receiver-general, which was afterwards extended to the secretary of the land-office, to show cause why a *mandamus* should not issue, commanding them to receive a certain certificate, in payment for city lots, located by the late *Thomas Billington*.

The application for the rule, was founded upon an act of the General Assembly, passed on the 9th of *March* 1796, (4 *vol. p.* 16. *Dall. edit.*) which contains the following enacting clause:

Sect. 1. "*Be it enacted*, &c. That it shall and may be lawful "for the Board of Property, and they are hereby enjoined and "required, to proceed upon the reports of the Commissioners appointed by the act passed the twenty-eighth day of "*March*, one thousand seven hundred and eighty-seven, entituled "An Act for ascertaining and confirming to certain persons, called Connecticut Claimants, the lands by them claimed "within the county of *Luzerne*," which have been filed in the "office of the Secretary, and ascertain, as nearly as they can, "from the documents so placed in the Secretary's office, and "from such further evidence as they may deem necessary, and "which

" which shall be produced to them, what sum or sums ought, on 1803.
" the principles of the aforesaid law, to be allowed to the res-
" pective owners; and the Receiver-General shall thereupon de-
" liver a certificate of such sum or sums to the respective owners
" and enter a credit in his books, for the same, which may be
" transferred to any person, and passed as credit, either in taking
" out new warrants in any part of the state where vacant land
" may be found, or paying arrearages on former grants: *Provided*
" *nevertheless*, That the value of the land, for which such certi-
" ficates are so to be delivered to the aforesaid claimants, shall
" not be estimated otherwise than if the same had been made by
" the Board of Property immediately after the report of the
" aforesaid Commissioners, in pursuance of the law herein be-
" fore mentioned: *And provided further*, That the claimants,
" who are by this act intended to be compensated, shall, at the
" time of receiving the certificates aforesaid, release to the com-
" monwealth their respective claims to the lands, for which they
" shall receive compensation."

Thomas Billington purchased several certificates, which had been issued under the authority of this act, and tendered them in payment, for warrants to be located on certain lots in the city of *Philadelphia*, which he alleged to be "*vacant land.*" The legislature having granted all the unappropriated city lots to the inspectors of the prison of *Philadelphia*, for public uses, the inspectors employed counsel, to oppose the rule for issuing a *mandamus*.

Accordingly, *Dallas*, in showing cause against the rule, stated two points, for the consideration of the Court: 1st. Whether upon a just construction of the act of *March* 1796, and acts *in pari materia*, the right of location could apply to land within the boundaries of the city of *Philadelphia*. And 2d. Whether, in the strictest sense of interpretation, city lots could be regarded as *vacant land*.

The act of *March* 1796 is ingrafted upon the act of the 28th of *March* 1787, usually called "the confirming law." 4 *State Laws*, 274. (*old edit.*) which, however, had been repealed by the act of the 1st of *April* 1790. 2 *State Laws*, 786. *Dall. edit.* It was expressly intended to entitle those *Pennsylvania* claimants, who had complied with the terms of the confirming law, "while "the said law was in existence, to the benefits of the same." *Preamble*, 4 *State Laws*, 16. *Dall. edit.* What, then, were the benefits conferred on *Pennsylvania* claimants by the confirming law. A right to an equivalent, for the land they surrendered, which might be taken "*either in the old, or new purchase*, at the option of the claimant." 4 *vol. State Laws*, 274. *s.* 9. (*old edit.*) And the act of *March* 1796 did not profess to enlarge, nor has it, in terms, enlarged the right thus conferred. Besides, the act of

1803. of *March* 1796, evidently restricts the location, under the *Wyoming* certificates, to those lands, for which the land-officers were previously authorised to grant warrants; and no authority was ever given to the land-officers to sell city lots, till the act of the 5th of *April* 1797. 4 *vol.* 165. *Dall. edit.*

Here, *Dallas* was stopped by the COURT, who declared, that they could not conjecture upon what ground the rule was tenable; and desired to hear the opposite counsel. *Ingersoll* and *Rawle*, however, acknowledged, that they saw the subject in a point of view different from that, in which it was presented, when they made the motion; and declined any further argument.

By the COURT: Let the rule be discharged.

Crousillat *versus* Ball.

CASE, on a policy of insurance upon ship and cargo, containing a warranty against seizure or detention, for any illicit, or prohibited, trade. (1) It appeared, in evidence, that the vessel and cargo were owned by the plaintiff, and were insured on a voyage from *Philadelphia* to *Cape Francois*; thence to *New Orleans*; thence back to the *Cape*; and from the *Cape* back to *Philadelphia*. When the vessel had arrived at the *Cape*, on the return voyage, war had broken out between *Great Britain* and *France*; and the calamities of *St. Domingo* compelled a number of its inhabitants, to seek an asylum in the *United States*. The captain of the vessel (who was addressed to merchants at the *Cape*, and only in case of their absence was entrusted with the disposition of the cargo) undertook to cover, as *American* property, a considerable quantity of coffee and cash, belonging to two of the fugitive *Frenchmen*; under a bargain, that they should pay to the owner of the ship a certain sum for passage money, and for the freight of the coffee; and to the captain, for his own separate emolument, 50 half-johannes in hand for covering the cash, with a contingent of 200 half-johannes more, on its safe arrival in the *United States*; and a sum equal to the freight, for covering the coffee. The vessel was captured and carried into *Jamaica*, and both vessel and cargo libelled as prize, in the Court of Vice-Admiralty. The captain filed a claim, for the ship, and the plaintiff's part of the cargo, and for freight on the covered

(1) This cause had been tried twice before, upon a declaration, containing a single count, charging the loss to have happened by the capture, arrest, and detention of a foreign prince. On the first trial, the jury could not agree; and on the second trial a special verdict was found, but so imperfectly, that judgment could not be rendered upon it. A *venire facias de novo* was, therefore, awarded; and the plaintiff had leave to add a count to his declaration, averring the loss to have happened by the barratry of the master; on which point new evidence was now given.

part

part of the property; but in his answers to the standing interrogatories, he had sworn, that the whole cargo belonged to the plaintiff, and that there were no papers on board, except such as he had delivered. On searching the vessel, however, the bills of lading, letters, and other papers, relative to the covered property, were found concealed; the whole cargo, including the master's own adventure, was condemned; and though the vessel was acquitted, upon further proof of *American* ownership, sent by the plaintiff from *Philadelphia*, it was expressly without freight, on account of the master's fraud. When notice of the capture was received, the plaintiff abandoned to the underwriters, stating "that the voyage was defeated, and the cargo taken out of the "hands of my agent," the captain. 1803.

On two former trials of this cause, the argument turned entirely upon the question, whether the underwriters were responsible for a loss thus occasioned by the misconduct of the captain, who was the agent of the owner? And the COURT were clearly of opinion, that by taking on board the property of *Frenchmen*, and covering it as the property of the plaintiff, the risque had been increased; that the perjury of the captain had, also, involved the neutral property, in the jeopardy of the belligerent masked property; and that, in fact, his misconduct, from beginning to end, had produced and justified a condemnation. Considering him, therefore, as he must, in law, be considered, in the light of the plaintiff's agent, the Court thought, that the plaintiff was not entitled to recover.

On the present trial, the plaintiff rested his right to recover, on the barratry of the captain; and urged, 1st. That although fraud is essential to constitute barratry; yet, if a captain of a vessel is guilty of a fraudulent act, with intent to benefit his owner, who is ignorant of the act, and neither authorised, nor assented to it, it is a case of barratry, within the indemnity of a policy of insurance. 1 *Stra.* 581. 2 *Raym.* 1349. *Cowp.* 154. 1 *T. Rep.* 259. 3 *T. Rep.* 278. 4 *T. Rep.* 36. 6 *T. Rep.* 379. 2 *Dall. Rep.* 137. 2d. That the captain acted, on the present occasion, as captain; and was guilty of a fraud, with a view to his own separate interest and emolument; which clearly amounted to barratry, though the ordinary freight and passage-money, were secured for his owner. And if barratry is committed, the insurers are answerable, although the loss is not the direct and necessary consequence of the barratrous act. 3d. That the captain was not the general agent and consignee of the plaintiff; and when he undertook to cover the property, he manifestly acted as captain, for his own benefit, and not as agent, for the benefit of his principal, upon a commission to be paid by the principal. 4th. That a warrantry against a seizure for illicit trade, means a seizure in the trade, in which the owner employs the ship; not a seizure

1803. seizure in a barratrous trade carried on by the master, without the owner's knowledge, or consent. 3 *T. Rep.* 278.

The defendant contended, 1st. That the plaintiff was estopped from alleging barratry, after he had approved the conduct of the captain (whom he expressly recognised as his agent, in the letter of abandonment) and endeavoured, by further evidence sent from *America*, to maintain the claim in the Court of Vice-admiralty at *Jamaica*. 2d. That the captain intended to benefit, and not to defraud, his owner, so no barratry was committed. 3d. That the captain, being the consignee of ship and cargo, was not capable of committing barratry; which furnishes a conclusive distinction between the present case, and the cases cited from the books. 1 *Emerig.* 370. 2 *Marsh.* 442. 2 *Dall. Rep.* 137. 9. *Park*, 91. 6 *T. Rep.* 7 *T. Rep.* And 4th. That the seizure detention and condemnation of the cargo, was on account of an illicit and prohibited trade, by covering belligerent property in violation of the law of nations, and the good faith of neutrals; as well as by a prohibited intercourse with a *Spanish* colony.

YEATES, *Justice*, delivered the charge of the Court, to the following effect. In this action, evidence has now been given upon a ground distinct from any, that was taken on the former trials; and the only question to be decided is, whether the cargo insured was lost by the barratry of the master?

Barratry is an act committed by the master of a vessel, of a criminal nature, without the license, or consent of the owner. There must be fraud in the transaction; a selfish and sinister design, for the master's own interest; for, if the act is done solely to benefit the owner, it does not constitute barratry.

It is the province of the jury to decide upon the credit of the witnesses, and the amount of the evidence. The enormity of the doceur, the lapse of time, and other circumstances, are calculated to excite doubt and suspicion. If, however, the jury think, that the captain meant to take the premium, for covering the property, to his own private benefit, in exclusion of his owner; and not, in the first instance, to pay it to the owner, expecting from him a gratuitous compensation, or reward; the act of barratry is proved, and the plaintiff must recover; unless the evidence shall satisfy the jury, that the captain was the general agent and consignee of the plaintiff, and acted as such. In that case, the law is equally clear, that the acts of a general agent, cannot, any more than the acts of the principal himself, be denominated barratry.

The other objections that have been made by the defendant's counsel, appear to be satisfactorily answered, in the course of the evidence and the argument. The proof of interest in the cargo is strong; and most clearly, the case is not a case of illicit trading, within the meaning of the warranty. The nature of the indirect

indirect intercourse with *New-Orleans*, a *Spanish* colony, was well known to the underwriters; and, in truth, the trade would not be illicit, if it was fairly carried on. Even, in that respect, therefore, the objection cannot be sustained; and as it respects the violation of neutral character, it is the very ground of the plaintiff's right to recover, if the violation was committed, for the private purposes of the master of the vessel. For, here we repeat, the sole question to be decided, is, whether the master, in breach, or evasion, of his orders, did a fraudulent act, in the course of the voyage, tending to his own benefit, and to the prejudice of his owner? If he did, the verdict must be for the plaintiff. If not, or if what he did, was in the character of a general agent, the verdict must be for the defendant. 1803.

Verdict for the plaintiff.

For the plaintiff, *E. Tilghman*, *Du Ponceau*, *E. S. Burd*, and *Dallas*.

For the defendant, *Ingersoll* and *Rawle*.

SUPREME COURT

OF

PENNSYLVANIA.

March Term 1804.

Maybin, surviving partner, &c. *versus* Coulon.
Coulon *versus* Maybin, surviving partner, &c.

THESE actions having been referred, the referees reported that there was due, in the first, from the defendant to the plaintiff, as surviving partner of *Joseph Anthony* and Co. a sum of 30,708 $\frac{16}{100}$ dollars; and that in the second there was no cause of action. To this report, *Coulon* filed a number of exceptions, of which it is only necessary to state the substance of the single exception, which was the ground of the decision of the Court: to wit, "That the balance reported to be due to *Maybin*, arose from a series of unlawful transactions, in violation of the acts of congress, respecting the registering of vessels, and the duties on tonnage and impost; and, consequently, no Court of justice could lend its aid to enforce the recovery."

The facts were briefly these: *Coulon*, an alien, came to the *United States* in the year 1794, bringing with him a considerable quantity of merchandize, which he placed in the hands of *Joseph Anthony* and Co. He had, also, left a considerable property in the *Isle of France*; and he was not only desirous to have that property brought to *America*, but to enter into various commercial speculations, with these and other funds, in the *European*, as well as *Indian*, markets. He accordingly entered into engagements with *Joseph Anthony* and Co.; and, in consideration of his making them the depositaries of his funds, with an allowance of ample commissions for services, and of interest for advances, they undertook to purchase vessels and cargoes for him, in their own names; and in like manner to import the return cargoes. Among the vessels purchased for *Coulon* (some carrying only a sea-

sea-letter) was the *America*, which was registered in *New-York*, as the property of *Joseph Anthony* and Co. *American* citizens; and a cargo afterwards brought in the *America*, from the *Isle of France*, though entirely owned by *Coulon*, was entered at the custom-house of *Philadelphia*, as owned by them. From the accounts and correspondence produced in Court, as well as before the referees, it clearly appeared, that the balance resulted from these illicit transactions; and that the sum reported to be due to *Maybin*, was about the amount of the commissions for services, and the interest for occasional advances; the nett price of the vessels and cargoes, having been actually paid from the funds of *Coulon*. 1804.

The counsel for *Coulon* insisted, that the referees had erred, in point of law, by giving a sanction to the violation of the acts of congress (1); and that their report could not, therefore, be sustained, or affirmed by the Court. In the course of the argument they cited, 1 *Pow. on Contr.* 183. 195. 201. 203. 1 *Bous. & Pull.* 340. 3 *T. Rep.* 454. 4 *T. Rep.* 466. 1 *Bous. & Pull.* 296. *Cowp.* 341. 5 *T. Rep.* 599. 1 *Bous. & Pull.* 556. 4 *Burr.* 2069. 3 *T. Rep.* 421. 6 *T. Rep.* 61. 405. 3 *Vez. jun.* 373.

The counsel for *Maybin* argued, That advances were made, and services performed, to a great amount, independent of the vessels and cargoes, and were not involved in any illicit imputation; that it did not appear that the sum reported arose out of an illicit consideration, or contract; that it was too late after a reference and report, which liquidated the accounts, to object to the legality of the consideration and contract; and that, even if the general transaction were illicit, still the contract being executed between the vendor and the vendee of the property, the plaintiff, not being the actual vendor, had a right to recover the money paid by *Joseph Anthony* and Co. to the vendor, at the request, and for the use of the defendant. In support of this last position, the following authorities were cited: 1 *Pow. on Contr.* 200, 1. 4 *Burr.* 2069. 1 *Bl. Rep.* 633. *Cowp.* 343. 3 *T. Rep.* 418, 9. 6 *T. Rep.* 61. 7 *T. Rep.* 3 *Vez. jun.* 612, 3. 8 *T. Rep.* 575. 577.

The cause having been argued, on these general grounds, during several days in *December* term 1803, and *March* term 1804, the unanimous opinion of the Judges was delivered, upon full consideration, by SHIPPEN, *Chief Justice*, in substance, as follows.

By the COURT: There is a just debt due from the defendant *Coulon*, to the plaintiff, *Maybin*; and, therefore, as far as the Court could lawfully act, they would be desirous to affirm the

(1) See the Registering Act, 2 vol. 131.; and the impost law, 4 vol. p. 279.

report

1804. report of the referees. Hence, we listened, with particular attention and favour to the attempt of the plaintiff's counsel to distinguish the origin of the sum reported, from the general mass of the illicit transaction. The attempt has not, however, been successful; so that we must decide the question on the principles of law, which are clearly established by the authorities that have been cited.

The positive provisions of the laws of the *United States*, respecting *American* registered vessels; the national policy of our navigation system; good faith towards the belligerent powers; and the very foundations of morality; have been violated in the course of the transaction, now exhibited to us. The act of the Court is necessary to give effect to the report of the referees: but no Court of justice of the *United States* can lend its aid, at any time, or in any degree, to recover a debt originating in a source so forbidden, so foul, and so pernicious. The report cannot, therefore, be affirmed. (1)

Report set aside.

Ingersoll, *E. Tilghman*, and *Levy*, for *Maybin*.
Du Ponceau and *Dallas*, for *Coulon*.

Deshler *versus* Beery.

THIS was an action of dower, by the widow of *David Deshler*, against the tenant of the premises, tried at *Easton*, *Northampton* county, the 27th of *June* 1804.

In point of fact, it appeared, that *Lesher* died, leaving a will, dated the 2d of *November* 1796, in which he bequeathed to his wife a legacy of 1000*l*., his household goods, and a house for life; and appointed her executrix, and *Neuhart* and *Schrudder* executors. Before his death, he had sold and conveyed the premises to *George Eddy*, taking bonds and a mortgage for the purchase money; but *Eddy's* conveyance was not recorded. The executors instituted a suit, obtained judgment, and issued execution against *Eddy*; in consequence of which, the same property was levied upon, and advertised for sale. At the instance of the widow (the present plaintiff) *Neuhart*, one of the executors, be-

(1) It appeared, that one of the referees, upon discovering the illicit nature of the transaction, declined proceeding; but was persuaded to resume the business of the reference, in consequence of an urgent letter from *Maybin*, appealing particularly to the sympathy and benevolence of the referee. One of *Coulon's* exceptions to the report, was pointed at this *ex parte* communication; and the COURT, in delivering their opinion upon the general question, stated, in strong terms, their disapprobation of one of the parties addressing the referees, by way of confidence, or soliciation, pending the reference, though the letter should not contain any remarks on the merits of the controversy.

came

came the purchaser, for the use of the estate; and the sheriff executed a deed to him, on the 9th of *June* 1801. And, with the knowledge, consent, and approbation, of the widow, he re-sold and conveyed the property, to *Beery* (the present defendant) on the 30th of *July* 1801. During these transactions, the widow never suggested a claim of dower; but there were several judgments against *Deshler's* estate, at the time of the sheriff's sale; and his debts, generally, far exceeded the assets for paying them. 1804.

The *plaintiff's* counsel insisted, that there was no relinquishment of the right of dower, on the sale to *Eddy*; that the sheriff's sale, on the judgment against *Eddy*, for the price of his purchase, could not extinguish the right of dower; and that the present tenant, if he had not direct notice of the widow's claim, had notice by a legal and equitable presumption, as his title depended on deeds, that naturally led to the inquiry. 2 *Bl. Com.* 132. *Co. Lit.* 32, 3. 1 *Fonbl. Eq.* 22. 2 *Fonbl.* 147. 159. 9 *Mod.* 37. 2 *Atk.* 83. 3 *Br. Ch.* 264.

For *the defendant*, it was urged, that in *Pennsylvania* there is no claim of dower in lands sold by legal process, for the payment of debts; that dower is barred, even in the case of a mortgage for a debt, though the wife does not join in the deed. 2 *Dall. Rep.* 127.; (1) that the money recovered from *Eddy* has been applied to the payment of debts; that there is no difference, as to the claim of dower, between the case of a power by will, to sell for the payment of debts, and the case of the widow's consent to make such a sale; and that the widow's silence, on the subject of this claim, throughout the transaction, operates as a bar and estoppel, to her enforcing it, against a *bonâ fide* purchaser, for a valuable consideration, without notice. 1 *P. Wms.* 393. 1 *Fonbl. Eq.* 151. 18 *Vin. Abr.* 112. *Finch. Rep.* 103. *Prec. Chan.* 35. 1 *Eq. Abr.* 355, 356. *Ca.* 8. 10. 9 *Mod.* 37. 2 *Vern.* 370. 580. *Cowp.* 201.

YEATES, *Justice*. Mrs. *Deshler* is entitled to recover her dower in the premises, unless the peculiar circumstances of the case operate as a bar. The circumstances relied upon to produce that effect, are these: she made *Neuhart* her agent to buy the land at the sheriff's sale; and she approved of the purchase, after it was made. She, also, knew and approved of the re-sale to the defendant, at a full price, and uncharged with dower; and, until the defendant had paid the price, she never set up the pre-

(1) *E. Tilghman*, on the trial, reported *Lacock's* case, referred to in 2 *Dall. Rep.* 127. to be a decision, "that dower was barred, where the husband *alone* mortgaged land; and his executors, under a power in the will, with the consent of the mortgagee, sold the land, for the payment of debts."

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1804. sent claim. The motives of Mrs. *Deshler*, in observing this silence, cannot be positively ascertained; but she might think, that, if the land sold high, in consequence of appearing clear of every incumbrance, there would be the better prospect, that her legacy of 1000*l.* would be paid.

Upon the whole, the jury will decide, whether Mrs. *Deshler's* line of conduct held up to the public, and, particularly, to the parties, that she meant to waive the claim of dower. If it did, the verdict should be against her. If it did not, and the jury think, that she always meant to assert her right of dower; then the verdict must be in her favour.

Verdict for the defendant.

Commonwealth *versus* Lyon.

THE defendant, having made an affidavit in the usual form, applied to SMITH, *Justice*, for the allowance of a *certiorari* to remove this indictment from the Quarter Sessions of *Northumberland* county, into the Circuit Court.

Cooper (acting for the *attorney-general*) stated the reasons, which had induced him to decline consenting to the removal; and the following authorities were mentioned. The removal of an indictment, at the instance of the defendant, is discretionary with the Court; but the discretion ought not to be exercised, without special cause. 2 *Hawk.* 407, 8. *s.* 27. 4 *Burr.* 2458. The removal is not usually allowed in cases of perjury, forgery, &c. because such offences should be discouraged; and removals not only tend to delay justice, but to discountenance prosecutions. *Ibid.* 408. *s.* 28. The act of assembly contemplates the same principle; for, if the attorney-general does not consent to the removal, writs of *certiorari* are only to be specially allowed, and certified in writing upon the writ, by the Supreme Court, or one of its judges, upon sufficient cause shown. 3 *State Laws*, 92. *Dall. edit.*

SMITH, *Justice*. It is not the practice to enter into an argument upon applications of this nature. The defendant has made the usual oath, as a ground for allowing the *certiorari;* and I shall, of course, allow it, unless something is shown, in relation to his character and conduct, which will induce me to suppose, that public justice is likely to be impaired, or defeated, by the removal.

Cooper declaring that the defendant's character was good, independent of its implication in the present charge; the Judge immediately signed the *allocatur*.

SUPREME COURT

OF

PENNSYLVANIA.

September Term 1804.

Commonwealth *versus* Matlack.

THE defendant had been clerk of the Senate; and in that character received 900 dollars, as a fund to defray the contingent expenses of the house, during several sessions. The Committee of accounts called upon him for a settlement; but he declined exhibiting his vouchers, unless they would allow him a certain retrospective compensation, to which he contended that he was entitled, under an act passed on the 22d of *April* 1794. The Senate thereupon directed the comptroller to institute the present suit. Upon the trial, the defendant proved, that he had expended considerably more money, than he had received, for the use of the house; and he claimed a verdict for the amount of his advances, as well as for the additional compensation allowed by the act of 1794.

But, after argument, the COURT declared, that the defendant could not indirectly recover from the state, a substantive, independent, claim by way of set-off, any more than he could directly recover a debt due from the state, by bringing a suit against her. That the present action was brought to compel an account for money received for the use of the Senate; in which the defendant, if he proved, that the money received was so applied, would be entitled to a verdict; but that even then, he could not be entitled to a verdict for the amount of his advances; which the Senate alone was competent to allow.

Verdict, generally, for the defendant.

M'Kean, attorney-general, for the commonwealth.
Dallas, for the defendant.

Rundle

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Rundle *versus* Murgatroyd's Assignees.

THE point agitated upon the trial of this cause, turned on the validity of a mortgage given to the plaintiff by *Murgatroyd*, to secure to his wife, the amount of a legacy, which had been bequeathed to her, by her grandmother. It appeared, that in the year 1784, *Murgatroyd* had entered into articles of agreement with trustees, by which he engaged to secure the legacy, in case he should become insolvent. He received the money, and mixed it with his other pecuniary funds; but took no steps to secure the amount for his wife, until the execution of the present mortgage, in *March* 1802, when he was insolvent, and was soon afterwards duly declared a bankrupt.

The case was considered, as a case of marriage settlement, by the counsel on both sides.

In support of the settlement, the following authorities were cited: 6 *T. Rep.* 154. 2 *Bous. & Pull.* 582. 6 *T. Rep.* 80. 2 *Atk.* 558. 1 *Atk.* 192. 1 *P. Wms.* 459. 2 *Dall. Rep.* 199.

In opposition to the settlement were cited, 1 *Fonbl.* 271, 272. 2 *Atk.* 480, 1. 8 *T. Rep.* 82.

SHIPPEN, *Chief Justice.* The mortgage given by *Murgatroyd* is resisted on behalf of his creditors, upon the general ground, that it was given in contemplation of bankruptcy. There is but one exception to the rule, which declares a conveyance so given to be void; namely, where a creditor obtains a preference, by urging his debtor for payment, and threatening him with legal process. The only question, therefore, is a matter of fact, whether *Murgatroyd*, at the execution of the mortgage, contemplated bankruptcy, and meant voluntarily to prefer the particular creditor? If the evidence proves the affirmative, the mortgage is void; but, if otherwise, it is lawful and valid.

It has been urged, in favour of the plaintiff's claim, that whatever may have been the situation of *Murgatroyd*, at the time of executing the mortgage, the act was done, in pursuance of a previous agreement, entered into for a valuable consideration, when he was perfectly solvent. It would be grateful to our feelings on the present occasion, could we express sentiments favourable to the maintenance and fortunes of a wife and children; but we cannot seek that gratification, through a sacrifice of the established principles of law. The agreement was executory; and although it had relation to a possible insolvency, it might, perhaps, independent of the bankrupt law, have been carried into effect. But no antecedent contract, can make the mortgage valid, upon the provisions and principles of the bankrupt law, if *Murgatroyd*

gatroyd actually gave it, when he was insolvent, upon the eve of a legal bankruptcy. The general creditors had then acquired an interest in his estate; and it was too late to perform an engagement for giving preferences and securities, at their expense, to any particular creditor. 1804.

The law respecting marriage settlements, is the same in *England* and in *Pennsylvania*. It requires a fair motive, as well as a valuable consideration; and the interest must be actually declared and vested, at the time of a settlement, or it cannot prevail against the rights of honest creditors.

The present case, by no means resembles the case of general *Stewart*'s settlement. There, Mr. *M'Clenachan*, on his daughter's marriage, delivered to general *Stewart* a large sum in certificates of public debt, expressly stipulating, that those certificates should be held and appropriated to the use of Mrs. *Stewart* and the children of the marriage. General *Stewart* always kept the fund represented by the certificates, distinct from his own immediate funds; and although he subscribed them, first to the new loan of *Pennsylvania*, and afterwards to the general loan of the *United States*, constituting the funding system, it was traced and ascertained, that the real estate specified in the deed of settlement (which, it is true, was made long after the marriage) had been, in fact, purchased with the actual proceeds of the original certificates, delivered by Mr. *M'Clenachan* upon the marriage. But here, the bequest of the legacy was made without stipulation, or condition; the money being received by *Murgatroyd*, was blended with his other property, so that a separate existence, or application, could never be traced; and, under these circumstances, he acquired a credit, which would be false and delusive indeed, were the property now withdrawn, upon an obsolete and latent pretence, from the creditors who trusted to it.

SMITH, *Justice*. I am, likewise, of opinion, that the mortgage must yield to the superior legal and equitable claims of the general creditors. It is a sound and uniform rule, that settlements made upon a wife and children, by persons who have not a sufficient estate to pay all their debts, are void against creditors. The decision upon general *Stewart*'s settlement was not a departure from the rule; but simply a recognition of the marriage portion of Mrs. *Stewart*, transformed and ascertained in a new shape. The late, as well as the present, Chief Justice, and myself, delivered our opinions at large in that case; and united in the result, for the reasons that have been suggested; none of which can be assigned in favour of the present claim, under the mortgage.

The jury, according to the charge, found a verdict for the defendant. (1)

(1) The validity of general *Stewart's* settlement was tried in *December* term 1799, in an amicable ejectment brought by *Blanchard's Lessee* v. *Ingersoll*. The facts proved upon the trial may be reduced to the following case:

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On the marriage of general *Stewart* with the daughter of Mr. *M'Clenachan*, in the year 1781, he received, in real and personal estate, a portion of 40,000*l. Pennsylvania* currency; of which loan office certificates, for money loaned by Mr. *M'Clenachan* in 1777, constituted about a moiety, bearing interest at six per cent. per annum. In delivering the certificates, Mr. *M'Clenachan* told general *Stewart*, "that he might use the interest, but that the principal of the certificates should be settled on his wife and children, and appropriated sacredly to their exclusive use and benefit;" and general *Stewart* promised expressly to make the stipulated settlement and appropriation. Soon afterwards general *Stewart* entered into partnership with Mr. *A. Nesbit*, and prosecuted an extensive scene of commerce, upon funds chiefly furnished by Mr. *M'Clenachan*. In the year 1785 general *Stewart* went to *England*, leaving the certificates in the hands of his partner (with whom they had been specifically deposited several years before) and taking a written receipt and promise, to return them to him, or to his order, on demand. While in *England*, he made a will, dated the 7th of *October* 1787, which bequeathed the certificates to his wife and children, but did not refer to any previous agreement, or promise to do so. He returned to *America* in 1787, and soon afterwards, assigned the certificates in trust to Mr. *M'Clenachan* and his partner, for the use of his wife and children, by a deed dated the 9th of *June* 1788; which was, also, silent as to any previous agreement upon the subject; but referred to the will of 1787, or any other last will which he might make, for the apportionment of the fund. The certificates were subscribed to the new loan of *Pennsylvania*; but were re-exchanged, and finally subscribed to the loan of the *United States*. The public stock having risen to its full nominal value, general *Stewart* proposed to Mr. *M'Clenachan* (Mr. *Nesbit* being dead) to sell it, and vest the proceeds in houses, and city lots, as offering a better speculation; to which Mr. *M'Clenachan* assented, upon the original principle, that the investment should be for the use and benefit of general *Stewart's* wife and children. The stock was, accordingly, sold and transferred, between *June* 1791, and *April* 1792; and the property in question was purchased, between *March* 1792, and *February* 1793, to the value of about 25,000 dollars. On the 20th of *May* 1793, general *Stewart* executed a deed before two witnesses, conveying this property to Mr. *M'Clenachan*, and his son, *George M'Clenachan*, in trust: and after reciting the deed of trust of 1787, the subsequent sale of the certificates, the investment of the proceeds, and the intention, that the real estate, shall be held to the same uses, as the certificates, according to the apportionment of the will of 1787, or such other last will, as general *Stewart* might make, it concludes with reserving a power of revocation, by consent of both parties, to sell the trust estate, and to vest the proceeds in other funds, but in the name of the same trustees, and for the same uses. The deed being executed, general *Stewart* delivered it to Mr. *M'Clenachan*, who deposited it, for safe keeping (as he resided in the country) with other valuable papers belonging to himself, in an iron chest, kept by general *Stewart* in his counting-house. General *Stewart* died on the 14th of *June* 1796, having, a few hours previously, made a will devising and bequeathing all his estate, real and personal, with a power to sell and convey, for the payment of his debts, and constituting Mrs. *Stewart* an executrix, and Messrs. *M'Clenachan*, *W. Tilghman*, and *F. West* executors, without referring to the deed of settlement, or any previous agreement upon the subject. In *May* 1793, and at the time of his death, he was generally supposed to be in affluent circumstances; but about four months after his death, a contrary suspicion arose, which subsequent events have confirmed. In taking the inventory of his effects, the deed of settlement was found; but the executors regarded it as incomplete and invalid. While, too, the executors thought the estate rich, Mr. *M'Clenachan* himself requested that the deed should be laid aside; and he and Mrs. *Stewart* joined the other executors in selling and conveying part of the trust property, for the payment of debts, under the power given in the will of 1796. The failure of *Morris* and *Nicholson's* notes (in which general *Stewart* and Mr. *M'Clenachan* had speculated largely) and other disappointments, proved fatal to the estate; and it was even ascertained, that, on a fair estimate, the general balance of general *Stewart's* account of property and debts, was against him, at the time that he executed the deed of 1793: but, on the other hand, he was clearly solvent when

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when he executed the deed of 1788. Under these circumstances, Mrs. *Stewart* consulted her counsel, on the validity of the deed of 1793, representing all the previous facts (which had not been adverted to, while general *Stewart's* estate was thought solvent) and was advised to prove and record it. This was done, on the 27th of *February* 1797, before any judgment had been obtained against general *Stewart*; and the trustees, having surrendered and assigned the trust estate, to Mr. *Ingersoll* in *June* 1797, an amicable ejectment was instituted, for the purpose of settling the conflicting claims of the widow and the creditors.

The counsel for Mrs. *Stewart*, (*W. Tilghman*, *Lewis*, *Ingersoll*, and *Dallas*) contended, that marriage was in itself a valuable consideration, to entitle the wife to a provision even out of her husband's estate, independent of her own; that a voluntary settlement, after marriage, by a husband, not indebted, is valid, with, or without, a consideration on the part of the wife, against all subsequent creditors; that an agreement for a settlement made in writing, before, and in contemplation of, marriage, will always be carried into effect; that a parol promise of a settlement, made before, and in contemplation of, marriage, is equally valid in *Pennsylvania*, although the law upon the subject has been altered in *England*, by an act of parliament; and that even where there is no previous agreement between the parties, a Court of Equity will never grant a wife's personal property to her husband, until he has made an adequate settlement upon her. As to the facts of the present case, it was argued, 1st. That *before the marriage*, a contract was entered into between Mr. *M'Clenachan* and general *Stewart*, *bonâ fide*, and upon a valuable consideration. 2d. That the settlement, now controverted, was made in pursuance of that contract, from the proceeds of the certificates, specifically traced, which constituted the original consideration. 3d. That the performance of the contract, was enforced by the principles of moral and social obligation; and is in strict conformity to the direction, which a Court of equity, or of law, would give to the appropriation of the fund thus ascertained. 4th. That it was not essential to the validity of the deed, that it should be proved and recorded, except as against purchasers and judgment creditors, whose rights and interests are not in question.

The following authorities were classed and cited by the counsel for Mrs. *Stewart*. 1 *Atk.* 15. 2 *Vez.* 18. 2 *Eq. Abr.* 51. *H.* 3. *Cro. J.* 454. 1 *Vez. jun.* 196. 1 *Dall. Rep.* 193. 430. 1 *Atk.* 168. 2 *Atk.* 519, 520. *Ambl.* 121. 2 *Atk.* 448. *Ambl.* 586. 1 *Eq. Abr.* 19. *Bunb.* 187. 2 *P. Wms.* 316. 1 *Vent.* 194. *Cro. J.* 158. *Comp.* 432. 2 *Vern.* 167. *Prec. Ch.* 208. 1 *Fonbl.* 88. 2 *Atk.* 419, 420. 1 *P. Wms.* 382. *Prec. Ch.* 548. *Prec. Ch.* 22. 1 *Dall.* 414. 2 *P. Wms.* 414. *Ambl.* 409.

The counsel for the general creditors, (*E. Tilghman* and *Levy*) urged the great inconvenience and injustice of allowing a mere verbal conversation, of eighteen years standing, to be the foundation of withdrawing from creditors, so great a mass of the debtor's apparent property. The inception of the alleged contract, is without writing, and without any witness; but the father, who was a party to it. It is admitted, however, that even a parol agreement, if fairly proved, and legally carried into effect, must prevail in *Pennsylvania*. But transactions, honest between the parties themselves, often become fraudulent, in relation to others; and the purest executory bargains between individuals, are liable to be defeated, upon general principles of public policy, unless they are executed with strict legal publicity and form. In the present instance, every thing conspires to beget caution, in the admission of the widow's claim. The trust deed of 1788, makes no allusion to a subsisting contract, between general *Stewart* and Mr. *M'Clenachan*; nor does it make an apportionment of the fund among the widow and children. The subject of the trust was a paper medium, as negotiable by delivery as a bank note; and shifting as it did from new loan to federal stock, from stock to money, on what rational ground (considering, particularly, that general *Stewart* held similar certificates and similar stock in his own right) can it be sustained, that the purchase of the real estate, was made with the proceeds of the identical certificates delivered on the marriage? But the settlement, being made of land, it is a voluntary settlement, within the principles and the provisions of the statutes; and it is not to be conceded, that a verbal agreement, to settle certificates, constitutes a valuable consideration,

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for the settlement of lands, by the ostensible owner, having become actually indebted. The deed is not only void, as it contains a clause of revocation, and cannot be regarded as a legal settlement; but it is fraudulent, as it remained in the possession and power of the grantor. In the course of this argument, the following authorities were cited: 2 *Bulst.* 226. 3 *Co.* 81. 1 *Burr.* 475. 2 *Vern.* 510. 1 *Atk.* 168. 2 *Atk.* 481. 1 *Atk.* 15. 2 *Vez.* 10, 11. 2 *Vern.* 510. 3 *Co.* 82. *b.* 2 *Freem.* 236.

The COURT (composed of M'KEAN, *Chief Justice*, and SHIPPEN and SMITH, *Justices*) delivered their opinions, unanimously, in favour of the settlement; and the jury found a verdict accordingly.

Duncanson *versus* M'Lure.

THIS was an action of trover for the ship *Mount Vernon*, which the defendant had purchased, under a sentence of condemnation as prize, pronounced by the *French* Provisional Tribunal of Prizes, established in the city of *St. Domingo*. The material facts of the case were these: (1) " Mr. *Duncanson*, an *English* gentleman, came to the *United States* with a view to settle; and, in order to manifest his intention, took an oath of allegiance to the state of *Pennsylvania*, though he had not been long enough in the country to entitle himself to naturalization, under the act of congress. Contemplating a circuitous voyage from *America* to *England*, and thence to the *East-Indies*, he applied to Messrs. *Willings* and *Francis* to procure a ship for him; and those gentlemen agreed absolutely with Mr. *Thomas Murgatroyd*, for the purchase of the ship *Mount Vernon*, owned by him; the bill of sale being made out, and delivered to them, upon terms of payment precisely ascertained. It, then, however, occurred to Mr. *Duncanson*, that as he had not yet acquired the rights of *American* citizenship, he could not enjoy the advantages, which he proposed to derive from his projected voyage. For, the trade from *England* to the *East-Indies* is, by the law of that kingdom, a monopoly; no *British* subject can, individually, embark in it, without incurring a forfeiture of his vessel and cargo; though it has recently been adjudged in *England*, that an *American* citizen is entitled to carry on the trade, by virtue of express stipulations in the treaty of amity and commerce between the *United States*

(1) This introductory statement of the facts, is transcribed from the charge of the Court, in the action brought upon a policy of insurance, on the *Mount Vernon*. 3 *Dall. Rep.* 491. Upon more mature consideration, the opinion there delivered, was over-ruled in the present cause, by the same Court; and, was, virtually, condemned in the Circuit Court of the *United States*, where an action of replevin had been first instituted, in the name of *Murgatroyd* v. *M'Lure*. See *post*. The name of Mr. *Duncanson* was now used, without his knowledge, or consent, for the benefit, it was suggested, of the underwriters, who had paid a total loss, under the former decision, and Messrs. *Willings* and *Francis*, who were in advance for the outfits of the ship. It was objected, that the names of the real parties should appear on the record; but the objection was not sustained by the Court.

and

and *Great-Britain*. (2) Hence it was deemed necessary to enter upon another operation. The bill of sale was sent back, and a new contract was formed between the parties, upon these principles: that Mr. *Murgatroyd* should remain the owner of the ship, and as such retain the register and make the insurance; (3) that she should, however, be delivered to Mr. *Duncanson*, or his agents; that Messrs. *Willings* and *Francis* should procure a freight for her on Mr. *Duncanson*'s account; that Mr. *Murgatroyd* should empower Mr. *Skirrow* (a gentleman who went as a passenger) to assign and transfer the ship to Mr. *Duncanson* in *England*, on the 1st of *September* ensuing, at which time Mr. *Duncanson* would be duly naturalized as an *American* citizen; and that the consideration money should be secured by the notes of Messrs. *Willings* and *Francis*, payable, at all events, in certain instalments." 1804.

The *Mount Vernon* sailed from *Philadelphia* on the 10th of *June* 1796, with the usual documents of an *American* vessel. As soon as she had cleared the capes of the *Delaware*, she was boarded and taken possession of by "the *Flying Fish*," a *French* privateer, and carried into the port of *St. John*, in the *Spanish* island of *Porto Rico*. While she remained there, the ship and cargo were libelled by the captors, in the Provisional Tribunal of Prizes, at the city of *St. Domingo*, in the island of *St. Domingo*; a Court established by the republic of *France* in that city, for the determination of questions of prize. And on the 30th of *August* 1796, after various proceedings, the following sentence was pronounced, by the Court:

"Thirteenth *Fructidor*, fourth year.

"Condemnation of the *English* ship *Mount Vernon*.

"Extract from the books of the office of the provisional tribunal respecting prizes established in *St. Domingo*.

"We *Francis Pons*, Judge of the provisional tribunal respecting prizes established in *St. Domingo*, having looked over our sentence of the seventh *Thermidor* last, where all the papers exhibited by citizen *Nadal*, captain of the privateer *Flier*, against the ship *Mount Vernon*, are duly noticed, through which we had submitted the decision of this prize to the civil commission of *Guarico*, which applies again to our tribunal for pronouncing sentence on this subject; having noticed also instructions which were officially given us by the citizen agent of the *French* Republic in this city, issued by the civil commission aforesaid, in whose archives they have been duly re-

(2) See 8 *T. Rep.* 31.

(3) The premium of insurance, however, was paid by Mr. *Duncanson*; the ship actually sailed on the voyage insured at his risque; and the recovery against the underwriters (3 *Dall. Rep.* 491.) was applied to the reimbursement of the purchase money, paid by Messrs. *Willings* and *Francis* on account of Mr. *Duncanson*.

"corded,

1804. " corded, from which it appears, first, that the papers having been " thrown into the sea by the captain in sight of the privateer " which captured him, secondly, that the captain and supercargo " having precipitately abandoned their ship, in spite of the good " treatment received by them from the *French* captain, and the " hints he gave them about remaining there in order to plead " their own cause, and thereby avoid her confiscation, thirdly, " the behaviour of the captured crew, fourthly, the captain being " a *Portuguese*, without a certificate of his naturalization, fifthly, " that the *United States*, in the last treaty which they concluded " with *England*, having suffered to be added to the articles which " have been looked upon till at present as contraband of war, " staves, tackles, sail-cloth, iron hoops, and finally all which can " be made use of for vessels, are sufficient motives to condemn " said ship; after a serious examination we have judged and do " judge that the ship *Mount Vernon*, captain *George Dominico*, " *Portugueze*, with her cargo, has been duly and justly captured " by the *French* privateer commanded by citizen *Nadal*, to whom " we adjudge her as property belonging to him, and of which " he may dispose under the clauses and conditions made with " his officers and crew, he being accountable for the duties of " invalids and the costs of the tribunal, which he shall pay to " the bearer of our notary's order. *Santo Domingo*, *Fructidor* " thirteenth (*August* thirtieth). Fourth year of the *French* Re- " public, one and indivisible. Signed in the Register, *Pons* Judge, " and *Despujeaux* Notary Public.

" (Signed) PONS Judge.

" *Despujeaux* Notary."

Under this sentence of condemnation, the *Mount Vernon* and her cargo were delivered to the captors by the *Spanish* governor of *Porto Rico*, with permission to sell them there. At the public sale, *Rousseau*, a naturalized *American*, purchased the ship; and afterwards sold her for 22,000 dollars, to *M'Lure*, the present defendant, an *American* citizen, who brought her to *Philadelphia*. A replevin was then issued for the ship, in the name of *Murgatroyd*, from the Circuit Court, for the *Pennsylvania* district; but it appearing on the trial, that *Murgatroyd* had received payment of all the notes, which Messrs. *Willings* and *Francis* gave for the purchase money, the COURT declared, that he had no property in the ship, to maintain a replevin; and directed a nonsuit. In consequence of that defeat, the present action of trover was brought in the name of Mr. *Duncanson*.

The cause was argued, at great length, upon the following general points: (4)

1st. Whether

(4) The trial of the cause, first came on, in *March* term 1804; but after all the evidence was heard, and part of the arguments of counsel, some of the jury

1st. Whether the ship *Mount Vernon*, at the time of her sailing and capture, was the *bona fide* property of *Murgatroyd*, a citizen of the *United States*; or was only registered and held in his name, in trust for *Duncanson*, an alien. 1804.

2d. Whether the capture of the *Mount Vernon* was a lawful, or a piratical act; considering the commission of the privateer, and the circumstances of the capture.

3d. Whether the *French* Court, established at *St. Domingo*, was a competent tribunal, to decide, in this case, the question of prize, or no prize; the city of *St. Domingo* then belonging to *Spain*, or not being surrendered to *France*; the ship lying in a *Spanish* port, at another island, belonging to *Spain*; and the *United States* being at peace, both with *France* and *Spain*.

In relation to these points, *the plaintiff's counsel* contended,

1st. That the property of the *Mount Vernon* continued in *Murgatroyd*, until the power was executed by *Skirrow*; or, at least, until the last of the instalments of the purchase money was actually paid; that the execution of the power, being prevented by superior force, capture, and detention, ought not to affect the original rights and interests of the parties; that the contract with *Duncanson* was merely executory (a species of contract recognised by the law) and until the specified event had actually occurred, to wit, an arrival in *England*, and a transfer by *Skirrow*, no property could vest; and that there was no fraud upon belligerent rights, no violation of neutral duties, in the formation, or affirmance of such a contract. 2 *Pow. on Contr.* 79. 3 *Dall. Rep.* 491. *Adm. Inst.* 218. 2 *Journ. Cong.* 114. 3 *Rob.* 24. 31. 39. *Treaty between the United States and France* (1778) 1 *vol. Acts Cong. p.* 378. *art.* 6. 15. 21. 23.

2d. That the capture of the *Mount Vernon* was piratical; for it is piracy, not only when a man robs without any commission at all, but when, having a commission, he despoils those whom he is not warranted to fight, or meddle with; such as are in alliance,

jury stated to the Court, that they felt themselves embarrassed from the declaration of three of their brethren, "that, consistently with their religious "principles, and conscientious scruples, they could not, under any circum- "stances of proof, or any course of reasoning, find a verdict in favour of the "party, who claimed the ship, under a condemnation as prize of war." It was wished, on both sides, to reconcile the objecting jurors, to the discharge of a public duty, in which their consciences ought to be governed by the law of the land, and not by personal considerations: but every effort being ineffectual for that purpose, the COURT observed, that they could not, on the one hand, exercise the oppression of coercing a juror to act in contradiction to his real religious, and conscientious scruples; nor, on the other, would they expose the defendant to the consequences of a trial, in which he might lose, but could not possibly obtain, a verdict. Lamenting that so much time had been consumed before notice of the objection, the Court directed a juror to be withdrawn.

or

1804. or friendship, with that state, which has given him his commission. 2 *Woodes.* 422. That at the time of the capture, the *United States* and *France* were in alliance and friendship; and, therefore, it was piracy even in a *French* commissioned vessel to seize, spoliate, and sequester, *American* property. And that whenever the piratical taking is succinctly ascertained, it becomes a clear and indisputable consequence, that there is no transmutation of property; no right to the spoil vests in the piratical captors; no right is derivable from them to any re-captors, in prejudice of the original owners. *Ibid.* 429. 9.

3d. That capture, without condemnation, does not work a change of property. 2 *Burr.* 693. 2 *Dall. Rep.* 5. That a condemnation to be lawful, must be pronounced by a Court of the captor, in the country of the captor, or of a co-belligerent. 1 *Rob. Sir Wm. Scott and Mr. Nicholl's letter to Mr. Jay.* That neither the island of *Porto Rico*, to which the ship was carried, nor the city of *St. Domingo*, where the condemnation was pronounced, belong to the country, or jurisdiction, of the captor; nor were *France* and *Spain* allies in the war, at the time of the capture. *5 vol. Debr. Col. Stat. Pap.* 18—21. That foreign judgments may be inquired into, wherever the Court, pronouncing them, has not jurisdiction of the subject, on principles of the law of nations, as well as on principles of the common law. 2 *Stra.* 1078. *Doug.* 1. *Park*, 353. (4 *edit.*) 1 *Rob.* 114. 3 *Dall. Rep.* 15. 2 *Rob.* 174. 3 *Rob.* 53. 3 *Rob.* 82. *Doug.* 555. *Park*, 363. 7 *T. Rep.* 523. 2 *Show.* 232. 1 *Emerig.* 232. 438.

In relation to the general points of the cause, the defendant's counsel contended,

1st. That the case exhibits a manifest violation of the registering act; and militates against the duty of a neutral character, by masking the real property of a belligerent alien. That the act of congress not only prohibits all open, avowed, ownership of an alien, in a registered vessel of the *United States*; but every species of secret or latent ownership in the ship, and her issues and profits, "*by way of trust, confidence, or otherwise.*" 2 *vol.* 131. *s.* 1. *s.* 2. *s.* 4. *s.* 7. *s.* 16. (*Swift's edit.*) 1 *vol.* 79. *s.* 6. (*Child's edit.*) That an ownership in trust, could never be more strongly characterised: for, the ship was bought for him, and the price was paid by him, through his agents; she was insured at his charge; she sailed at his risque; and an agent named by him, was possessed of an absolute power to transfer her to him. That the contract was not executory, in the sense contended for; as the intention was to pass an immediate right of property, an absolute usufructuary enjoyment, keeping back the formal title only for a specific, unlawful, purpose; as there was no covenant to convey, depending on any event, but an absolute power and mandate to transfer; as there was no mutuality, the price being payable at all events, and

and *Murgatroyd* was never again capable of sharing in the profit or loss of the ship. That the property was so changed, at the time of sailing, that the ship would have been liable as *Duncanson*'s to execution and attachment, and to the statutory assignment of the insolvent, or the bankrupt, law. That if such a mask could secure impunity, in violating the registering act, aliens, and particularly belligerent aliens, would soon be the owners of a great portion of the *American* tonnage. *Maybin* v. *Coulon*. *ant*. 5 *T. Rep*. 112. 3 *Dall. Rep*. 495. 3 *Rob*. 243. (*a*) 4 *Rob*. 91. 93. 95. That, indeed, in every aspect of the cause, an *American* common law court ought not to interpose: not, if it is a breach of our navigation laws; not, if it is a cover of belligerent property; not, if *Duncanson* is an *Englishman*; and not if it is a question of prize, which is exclusively of admiralty cognizance. 2 *Rob*. 111. 114. *Wesk*. 359. 1 *Mag*. 437. 3 *Rob*. 269. 2 *Dall. Rep*. 165. 4 *T. Rep*. 382. 3 *Dall. Rep*. 6. 3 *Dall. Rep*. 25. 32. 7 *T. Rep*. 696. 8 *T. Rep*. 444. *Park*, 71. 2 *Dall*. 4. 2 *Burr*. 693, 4. 2 *Dall. Rep*. 270. 1804.

2d. That the capturing privateer had a lawful commission from the *French* republic; captured the *Mount Vernon* as prize, on the high seas; and sent her for adjudication to a Court, established by the nation of the captor. Such a capture may be tortious, but it can never be piratical. In the present instance, however, the appearances at the time, and the result of subsequent investigation, must equally justify the proceeding: for, it is now notorious, that the *Mount-Vernon* was an *English* owned ship, going to a belligerent port, and with false papers, describing a false destination. If, then, *Duncanson* was the owner of the ship, and was an enemy of *France*, who had not acquired the rights of neutral domicil, the capture was lawful; and the Courts of this country could not interfere, before condemnation; nor, *a fortiori*, can they interfere after condemnation and sale. *Vatt. b*. 3. *c*. 14. *s*. 208. *p*. 583.

3d. That the city of *St. Domingo* was either to be considered as belonging to *France*, under the cession of the treaty between her and *Spain*; or as the country of *Spain*, an ally of *France*, on the eve of engaging in the war against *Great Britain*. *Treaty of* 22 *July* 1795, *art*. 9. That the *French* constitution had regarded the cession as complete, and the legislature of *France* had actually divided the *Spanish* side of *St. Domingo* into departments. *Const. art*. 3. That *Great Britain*, in her manifesto, had, also, considered the cession from *Spain* to *France* as absolute. *New Annual Reg. p*. 121. 1796. That a recurrence to dates will satisfactorily show the relative situation of *France*, *Spain*, and *England*, on the co-operation of the two former in hostilities against the last. Thus; the *Mount Vernon* was taken on the 9th of *June*, carried into *Porto Rico* on the 4th of *July*, condemned at *St. Domingo* on the 30th of *August*, sold on the 26th of *October*

1804. 1796, and kept under embargo until the 27th of *May* 1797. A treaty of alliance between *France* and *Spain*, was signed on the 19th of *August*, and ratified on the 6th of *September* 1796, in which a joint war with *England* is contemplated; and, accordingly, on the 5th of *October* 1796, *Spain* published a declaration of war. Thus, when the *Mount Vernon* was captured and condemned, *France* and *Spain* were in alliance, with a view to a war against *England*; and the joint war was actually declared and waged, while the ship remained within the territory and power of the allies. That, independent of the question of alliance and hostility, neither the place of condemnation, nor the place where the ship lay, can avail the plaintiff, if *Spain* permits, and *England* does not complain. That the institution of Courts for prize causes, in countries not belonging to the captors, nay, in neutral countries, has been practised, as well as recognised by *England*; and has been practised as well as recognised by *America*. 2 *East*, 473. 2 *Rob.* 174. 4 *Rob.* 34, 5. 44. *Carth.* 474. 2 *Danv. Abr.* 269. *pl.* 8. 2 *Brownl.* 11. 29. *Godb.* 386. *Parke*, 353. 5 *vol. Journ. Cong.* 440. (30 *Nov.* 1779.) *Cochin.* 708.

The COURT delivered a long and elaborate charge to the jury, on the two principal points in the cause. 1st. They expressed considerable doubt, whether the condemnation of the *Mount Vernon* was pronounced by a competent Court; inasmuch as the ship was not within the jurisdiction of the country of the captors; as the evidence did not satisfactorily prove, that *France* had taken possession of *St. Domingo*, in pursuance of the treaty of cession; and as *Spain* and *France* did not appear to be actually allies in the war, at the time of the capture and condemnation. 2d. But they were clearly and decidedly of opinion, that the charge delivered in the case of *Murgatroyd* v. *Crawford* (3 *Dall. Rep.* 491.) was erroneous and untenable. Acknowledging and retracting, therefore, with candour, the error which they had then committed, they declared that the verdict must be in favour of the defendant; inasmuch as the plaintiff's claim to the ship was founded upon a transaction, in fraud of the positive laws and public policy of the *United States*, which exclude an alien, from any degree of interest in an *American* registered vessel, by way of trust, confidence, or otherwise.

Notwithstanding the explicit decision and direction of the Court, one of the jurors refused, during four days, to concur in a general verdict for the defendant; declaring, in open Court, "that although he stood alone, he would only lay down his "opinion with his life: for, he never could consent to cast the "property of the ship upon the defendant, through the medium "of such a capture and condemnation." At length, the form of a special verdict was submitted to the jury, by each side; and the jury adopted and returned the form prepared by the defendant's counsel.

When

When the special verdict was brought before the Court, for argument, at *December* term 1804, the defendant moved for a new trial, on the ground, that although the facts were sufficiently found, for a judgment, on the point of a breach of the acts of congress; they were not sufficiently found to enable this Court, or the High Court of Errors and Appeals, to decide upon the objections to the condemnation, because *St. Domingo* was *Spanish* territory, within which a *French* prize Court was not competent to act; and because the ship was not within the jurisdiction of *St. Domingo*, but at *Porto Rico*, when she was condemned. Besides, in an action of trover, the jury are bound to give the actual value of the property if they find for the plaintiff; and in this case they have given only prime cost of 22,000 dollars on the sale to the defendant; whereas the value, according to the only evidence before the jury, was 40,000 dollars. 1804.

After repeated arguments, the COURT determined that the facts were not sufficiently found, on the whole case; and, although they adhered to their opinion, as delivered in the charge, in justice to the plaintiff, who had a right to a writ of error, as well as in consideration of the importance of the decision, it became necessary and proper to award

A new trial. (5)

(5) YEATES, *Justice*, thought that enough was found, upon the special verdict, to give judgment for the defendant, on the paramount, and controuling, question of a violation of the acts of congress. He was, therefore, opposed to a new trial, though the facts on the other questions were, he admitted, defectively found, and though he did not approve of the estimate of the damages, for which no evidence had been adduced at the trial.

SMITH and BRACKENRIDGE, *Justices*, however, pronounced the decision of the Court.

SUPREME COURT

OF

PENNSYLVANIA.

December Term 1804.

Commonwealth *versus* Franklin *et al.*

THE general question, upon the constitutionality of the intrusion act (3 *State Laws*, 703. *Dall. edit.*) having been decided at the last term, in the affirmative, this case came again before the Court, upon the remaining exceptions in arrest of judgment, as they are stated *ante*, *p.* 257.; but the counsel for the defendants abandoned the third and fourth, and the argument and decision turned entirely upon the sixth and seventh, exceptions.

For the defendants. If the cause was never pending in the Circuit Court, as the sixth and seventh exceptions allege, all the proceedings there, are, of course, *coram non judice;* and the judgment must be arrested. These exceptions will, therefore, be first considered. Then, 1st. The *certiorari* is directed to a wrong Court. 2d. It is returned by unauthorised judges. 3d. It does not describe and identify the indictment, which is annexed to the return.

1st. The Courts of Quarter Sessions, and of Common Pleas, are Courts of distinct, and independent, jurisdiction; though the same judges officiate in both Courts. Each has its own seal, its own record, and its own clerk; and the subjects of their cognizance are essentially different; the one relating to criminal prosecutions; and the other to civil suits. *Const. art. 5. s.* 1. 7. 4 *T. Rep.* 499. 1 *Bac. Abr.* 572, 573. 2 *Hawk. P. C. c.* 27. *s.* 80, 81. 72.

2d. The return is made by the associate Judges of the Common Pleas, to the Judges of the Supreme Court, and not to the Judges of the Supreme Court sitting as a Circuit Court. And the

the authorities already cited, show that a writ wrong directed, or wrong returned, will remove nothing. 1804.

3d. The indictment consists of two distinct counts, containing two distinct charges, of two distinct offences. Three of the defendants only are implicated in the charge of the first count: and yet the *certiorari* directs the removal of an indictment against the four defendants for both offences. This is not such an indictment, and, therefore, the proper record has never been removed. 2 *Ld. Raym.* 1199. 1 *Ld. Raym.* 609. 2 *Hawk. c.* 27. *s.* 82. 2 *Ld. Raym.* 1803.

For the commonwealth. The *præcipe* for the removal of the indictment, was written by the counsel of the defendant; the *certiorari* was worded conformably to the *præcipe;* the writ was specially allowed, and issued, at the instance of the defendants: and, yet, the defendants endeavour now to defeat the jurisdiction of the Circuit Court, by the irregularity of their own process. It is a general rule, in civil cases, that no man shall take advantage of his own wrong. In criminal cases, too it is a rule, that errors in form shall be taken advantage of as soon as is reasonable after they occur, or a waiver of the advantage shall be inferred; and an indictment may be removed, without *certiorari*, by delivery of the Justices, *per manu propria.* Here, the defendants appeared *gratis*, and never objected to the imputed errors, for a year after their trial. *Hawk. B.* 2. *c.* 27. *s.* 102. 2 *Stra.* 843. 2 *Hale*, 213. 2 *Ld. Raym.* 1518, 9.

But, independent of this general course of reasoning and authority, the *certiorari* is well directed and returned. The true designation and official style of the Judges must be "Judges of the Court of Common Pleas;" for, their commissions are only in that character; and "Judges of the Court of Quarter Sessions," is a style of office unknown to the constitution and laws. The *certiorari* is directed "to the Judges of the Court of Com-"mon pleas, for *Luzerne* county, and every of them, to remove "the indictment depending before them, or some of them." Now, the indictment must have been depending before them, or some of them, sitting as a Court of Quarter Sessions. The only use of a description is, to ascertain the person required to do an act; and here the description does ascertain the persons, who composed the Court of Quarter Sessions; who are, therefore, the persons, before whom the indictment was found; who ought to transmit the record to the superior Court; and who have sufficiently done so, by returning it to the Judges of the Supreme Court, those Judges being the constituent members of the Circuit Court, sitting in the county of *Luzerne.*

Nor is the objection to the description of the indictment more valid, than the objection to the description of the Judges. The *certiorari* does not, in fact, call for the removal of an indictment against

1804. against four persons for two offences; but it issued "to remove "an indictment for combining and conspiring for the purpose of "conveying, possessing, and settling on lands, &c. *And also* for "combining and conspiring for the purpose of laying out town-"ships, &c. wherein the commonwealth is plaintiff, and *John* "*Franklin*, *Elisha Satterlee*, *John Jenkins*, and *Joseph Biles*, "are defendants:" that is to say, an indictment wherein the commonwealth is plaintiff, and those four persons are defendants, although it may contain a count, in which three only are charged; and an indictment which does, indeed, charge two offences to have been committed, though three of the defendants committed the first, and all of them committed the second. Even, however, suppose, that the *certiorari* had described an indictment against four persons, when only three were, in fact, indicted; yet, the record being transmitted, and the three persons indicted, actually appearing, and being tried, there can be no injustice, or irregularity in the proceeding. 4 *Vin. Abr.* 337. (*B.* 2.) *pl.* 2. 1 *Roll. Abr.* 395. 4 *Vin. Abr.* 338. *pl.* 6. *in note.* *Ibid. pl.* 7. 2 *H. H. P. C.* 214. 4 *T. Rep.* 499.

SHIPPEN, *Chief Justice.* The objection to the direction of the *certiorari* is fatal. The power and cognizance of the Judges of the Court of Common Pleas, do not extend to criminal cases. Those Judges are, indeed, *ex officio*, members of another Court, which possesses a criminal jurisdiction; but, when sitting there, they are Judges of the Court of Quarter sessions, not of the Common Pleas.

I am, also, inclined to think, that a *certiorari*, calling for the removal of an indictment against four, generally, will not remove an indictment, which charges only three persons, in one of its counts. It it true, that the Circuit Court may obtain the removal and cognizance of an indictment, as well upon the delivery of the record, by one of the Judges of the Court of Quarter Sessions, *per propria manu*, as upon the return to a *certiorari*. The present case, however, rests upon the authority of the writ; and, though it is not without doubt, I am disposed to hold, that not only the direction and the return are irregular; but that the body of the writ is defective, in the description of the indictment to be removed.

YEATES, *Justice.* The authorities cited for the commonwealth are in point, to show that the *certiorari* for the removal of an indictment against four, is sufficiently descriptive, to remove an indictment against three only, under such circumstances, as appear upon the present occasion. My only difficulty, therefore, arises from the direction and the return of the writ; which, on a question of jurisdiction, in a criminal case, must, I think, be deemed fatally irregular.

SMITH,

SMITH, *Justice*. I have hitherto declined taking any part in the judicial proceedings against the defendants; because, I am personally interested in the lands, on which, it is charged, they have unlawfully intruded. But as my opinion is favourable to them, on the present point, I will not abstain from delivering it. 1804.

The last objection is fatal, I think, to the proceedings. The direction of the *certiorari* was to the Judges of a wrong Court; and the return of the writ is, also, made by the judges of a wrong Court. The Judges of the Court of Common Pleas never had cognizance of the indictment; nor could they have any power over the record of the Court of Quarter Sessions, to transmit it to the Circuit Court. The trial was, therefore, *coram non judice*. Judge BRACKENRIDGE and myself determined the same point, the same way, in *Centre* county, upon the removal of an indictment by the commonwealth.

BRACKENRIDGE, *Justice*. Having already decided the leading question, in the case referred to by Judge SMITH, it is only necessary to add, that I have heard nothing, upon the present occasion, to induce me to change my opinion.

Judgment arrested.

SUPREME COURT

OF

PENNSYLVANIA.

March Term 1805.

Welsh *versus* Murray.

CASE stated for the opinion of the Court. On the 1st of *August* 1804, judgment was entered, by confession, at the suit of *Ewing* v. *Murray*, in the Common Pleas of *Philadelphia* county; in which the declaration was entitled of *June* term preceding. On the 3d of *August* 1804, judgment was entered, by confession, in the Supreme Court, against the same defendant, at the suit of *Welsh*, the present plaintiff; and the declaration was entitled as of *March* term preceding.

The question submitted was, which judgment was entitled to a priority of payment, from the proceeds of the sale of the defendant's real estate?

Wallace, on behalf of *Welsh*, the present plaintiff, contended, that the Supreme Court judgment, though, in fact, last entered, had a legal relation to *March* term; and must be preferred to the Common Pleas judgment, which related only to *June* term. He cited authorities to show the relation at common law: 14 *Vin. Abr.* 616. 12 *Mod.* 519. 3 *Bl. Com.* 420. 6 *Mod.* 191. *Yelv.* 35. 3 *Burr.* 1596. 1 *Wils.* 39. 2 *Saund.* 9. And he argued, that neither the *English* statute of frauds, nor the *Pennsylvania* act of assembly, affected the legal relation of a judgment, except only in the case of *bonâ fide* purchasers; not in the case of conflicting judgments. 3 *P. Wms.* 398. *Salk.* 401. 7 *Mod.* 39. *Salk.* 87. 2 *Ld. Raym.* 776. *Stra.* 882. 7 *Mod.* 93. *Stra.* 1081. 6 *Mod.* 191. *Barnes.* 266, 7, 8. 270. *Willes Rep.* 427. *Cro. C.* 102. 1 *T. Rep.* 116. 7 *T. Rep.* 20. 1 *Saund.* 219. 1 *Dall. Rep.* 450. 2 *Burr.* 950. 967. 1 *Bl. Com.* 69.

Rawle,

Rawle, in support of the Common Pleas judgment, remarked, that his opponent was not content to enjoy an equality, but insisted upon a preference; and, therefore, there was no equity in his favour. He then contended, that there was an essential difference between the law of *England*, and the law of *Pennsylvania*, on the subject; that, although the question would often arise here, as lands were subject to execution and sale, it would seldom arise there; that the practice had uniformly been to pay judgments, out of the sale of real estates, according to the actual date of entering them; (1) and that the point had already been adjudged in *Hooton* v. *Will.* 1 *Dall. Rep.* 185. 450. 1805.

By the COURT: We are clearly of opinion, that the judgment first entered, is entitled to be first paid. The plaintiff in the Common Pleas must, therefore, enjoy his preference. (2)

Dupont *versus* Pichon.

THE plaintiff had issued a *capias* against the defendant, in an action upon the case, &c. and a citation was served upon him, in the following terms:

(1) The following certificates were founded on the fact of practice:

"I certify, that while I held the office of sheriff for the city and county of *Philadelphia*, I uniformly settled the payment of judgments, in the case of sales of real estates, according to the actual dates of those judgments certified by the respective prothonotaries, without reference to the terms, of which the said judgments were entered.

JAMES ASH."

Philadelphia, December 18th, 1804.

"I certify that the above was also my practice, while I held the office of sheriff.

ISRAEL ISRAEL."

"I certify that the above was also my practice, while I held the office of sheriff.

JOHN BAKER."

(2) A question of priority of judgments, also, arose in the Common Pleas, of *Philadelphia* county at *June* term 1806, in the case of *Emnel* v. *Garwood*.

It was on a case stated, between two creditors of the defendant, each of whom had entered judgment, by virtue of a bond and warrant, on the same day, at the distance of a few hours. It was held by the COURT (RUSH, president) that there should be no precedence between the judgments; but that the proceeds of the sales, which arose from real estate, should be divided.

The reason chiefly assigned by the *President*, was the inconvenience of a contrary rule, there being several courts, in which judgment might be entered on the same day; and the authority on which he chiefly relied was lord *Porchester*'s case, as stated by *Buller* in 1 *Durnford and East*, 118.

Milnor for the second creditor.
Rawle contrà.

1805.

"SIR,

"You are hereby cited to show your cause of action, and why "the defendant, claiming privilege as charge d'affaires of the "*French* republic, should not be discharged from the process issu- "ed against him, at the city hall, in the city of *Philadelphia*, at 10 "o'clock to-morrow forenoon. *Philadelphia*, 1st of *March* 1805.

"EDWARD SHIPPEN."

The citation was returned to the Judges of the Supreme Court, then holding a Court of *Nisi Prius*; (1) and after argument, by *Du Ponceau* and *Dallas*, for the defendant; and by *Ingersoll* and *Wallace*, for the plaintiff, the following order was made by the Judges, who did not think, that individually, or sitting at *Nisi Prius*, they could quash the process:

"*It is ordered*, that the defendant be discharged on common "bail; and that at the next Supreme Court, in Bank, on the 4th "day of this instant *March*, it may be considered by that Court, "whether the defendant should, or should not, be discharged "from the process issued against him; or whether he should be "held to bail, and the present order be discharged."

At the opening of the Court, on the first day of the term (all the Judges being present) *Du Ponceau* and *Dallas* moved, that the defendant be discharged absolutely from the process. They produced Mr. *Pichon*'s credentials, by which it appeared, that he had not only been appointed commissary general of commercial relations, but, also, charge d'affaires of the *French* republic; his continuance in the latter character, however, being limited, until a minister plenipotentiary should arrive in the *United States* from *France*. It appeared by Mr. *Pichon's* deposition, that the minister, general *Toureau*, had arrived in the *United States* about the 12th of *November* 1804; that in compliance with Mr. *Pichon's* instructions from his government, he had been anxiously making all the necessary arrangements, for his return to *France* with his family; that his detention in the *United States*, since the arrival of general *Toureau*, had solely and exclusively been owing to the business of closing his official transactions as charge d'affaires, and to the delay in receiving his public papers and documents, which were shipped in a vessel from *Alexandria* for *Philadelphia*, but were carried into *New-York*, in consequence of the obstructed navigation of the *Delaware*: and to the impracticability of obtaining a passage for *Europe* at the port of *Philadelphia*, for a considerable time past; that Mr. *Pichon* had never, in the slightest degree, abandoned, or suspended, his intention of returning to *France*; but, on the contrary, was determined to go thither, with all possible dispatch, as soon as the obstacles, which

(1) SHIPPEN, *Chief Justice*, and SMITH and BRACKENRIDGE, *Justices*, composed the Court.

he

he had stated, should be removed, and the condition of his family would permit. It was further stated in the deposition, that during the time of Mr. *Pichon's* executing the functions of charge d'affaires, and before the arrival of general *Toureau*, it became his official duty to superintend and direct the equipment and supply of certain *French* frigates, lying in the harbour of *New York*; that he employed the plaintiff in that business, to make the necessary advances of money; and for his reimbursement gave him certain bills of exchange on *France*, drawn, however, on his private bankers; that the plaintiff well knew, that Mr. *Pichon* acted in the premises merely as public agent of the *French* republic, and is not indebted to the plaintiff on his private account; nor, in any other manner, than as the drawer of the bills of exchange, which were delivered to the plaintiff by the *French* consul at *New-York*; and the fate of which Mr. *Pichon* had not definitively heard. (1) 1805.

Upon these facts, it was urged, that although no privilege was claimed for Mr. *Pichon*, as consul, he was entitled to privilege, as charge d'affaires, *eundo, morando, et redeundo*; 1 *vol. p.* 110. *s.* 25, 26, 27. *Vatt. B.* 4. *c.* 6. *s.* 74, 5. *p.* 675, 6. *Ib. c.* 7. *s.* 83. *p.* 682. *Ib. c.* 9. *s.* 125. *p.* 726. *Ib. c.* 8. *s.* 111. *p.* 713. *Mart.* 206. that he was not bound to produce any testimonials of his diplomatic character, the notoriety of his reception by the President, being all that the nature of the case, or uniform usage, required; that a day's delay, in recognising the privilege of a public minister, to obtain certificates from our own government, must either compel him to give bail, or to submit to actual imprisonment; and that the precedent established on this occasion, would attract the serious attention of every foreign minister and government. It, therefore, became highly important to claim and obtain the discharge, on the single ground of diplomatic privilege, without adverting to the official origin of the debt, for which the suit was instituted; and for which Mr. *Pichon* ought never to be deemed personally responsible. (2).

Ingersoll, *Wallace*, and *Binney* disputed the extent of the privilege; and the sufficiency of the excuse for Mr. *Pichon*'s protracted residence in the *United States*, after general *Toureau*'s arrival. They insisted that the appointment as charge d'affaires was limited in its own terms; that his arrival and continuance in the *United States* were, principally, on account of his consular com-

(1) After Mr. *Pichon* was discharged from the process in this suit, the plaintiff issued another *capias* from the Circuit Court of the *United States*; but before the writ was served, information arrived, that the bills drawn in favour of the plaintiff had been paid by the *French* government; and the proceedings were suspended, after notice of a motion to quash the writ on the ground of privilege.

(2) See 3 *Dall. Rep.* 384.

mission;

1805. mission; and that, at least, proof should be produced from the secretary of state of his reception as a minister, before he was discharged from the *capias*, upon the claim of privilege.

The COURT were decidedly of opinion, that Mr. *Pichon* would be entitled to privilege as charge d'affaires, till his return to *France*; but Chief Justice SHIPPEN seemed inclined to wait for information, from the department of state, as to his actual reception by the president in that character. On its being intimated, however, that the attorney of the district had become responsible to the sheriff for Mr. *Pichon's* appearance, only till the sense of the Court could be obtained; and that Mr. *Pichon* must now, probably, submit to imprisonment under the capias; the judges concurred in discharging him absolutely from the process.

CIRCUIT COURT,

PENNSYLVANIA DISTRICT.

April Term 1796.

Present IREDELL, an Associate Judge of the Supreme Court.
PETERS, District Judge.

Searight *versus* Calbraith *et al.*
Calbraith *et al.* *versus* Searight.

SEARIGHT agreed, in *February* 1792, to sell to *Calbraith* & Co. a bill of exchange for 150,000 livres tournois, drawn upon *Bourdieu*, *Chollet*, and *Bourdieu* of *London*, payable in *Paris*, six months after sight; for which *Calbraith* and Co. agreed to pay at the rate of 17 pence the livre, (making in the whole, 10,625*l.* *Pennsylvania* currency) in their own notes, dated the 1st of *May*, and payable the 1st of *July* 1792. The bill was, accordingly drawn and delivered to *Calbraith* and Co. who indorsed it to *George Barclay* and Co. of *London*, by whom it was presented for acceptance; and on the 27th of *March* 1792, *Bourdieu*, *Chollet*, and *Bourdieu* accepted the bill, "payable at the domicil of Messrs. *Cottin*, *Jonge*, and *Girardot*, at *Paris*." *George Barclay* and Co. afterwards indorsed and forwarded the bill to *G. Olivier*, who, on the 6th of *October* 1792, presented it for payment to Messrs. *Cottin*, *Jonge*, and *Girardot*; and those gentlemen tendered payment in assignats, which, by the then existing laws of *France*, were made a lawful tender, in payment of debts. Mr. *Olivier* refused to receive the assignats, by order of *George Barclay* and Co., declaring, at the same time, that he would receive no other money than *French* crowns; and thereupon each party protested against the act of the other. The bill being returned under protest for non-payment, *Searight*, on the one hand, instituted a suit, to recover the sum which *Calbraith* and Co. had originally stipulated to pay; and, on the other hand, *Calbraith* and

1796. and Co. instituted a suit to recover damages for the protest of the bill. And these suits were agreed to be tried together, by the same jury.

On the trial of the cause, evidence was produced, on both sides, to ascertain and fix the precise terms of the original contract, for the sale and purchase of the bill of exchange; particularly as to the stipulation of a rate for estimating the livre; as to the purchase being made for cash, or on credit; and as to the knowledge and view of the parties, relative to the existence of assignats, or the law of *France*, making them a legal tender in payment of debts. And the great question of fact for decision, was, whether the parties contracted for a payment in gold and silver; or tacitly left the medium of payment, to the laws of *France*, where the bill was payable? The law arising from the fact, was discussed at large, according to the different positions of the parties in interest.

For Searight, it was shown, by the decrees of the *French* government, that assignats were established as a circulating medium for the payment of debts, before, and at the time of, the contract for the bill of exchange: *Decree of* 16 *and* 17 *April* 1790. *s.* 3. *King's Proclamation of* 19 *April* 1790. and this fact being known, it was contended, that the purchase of a bill payable in *France*, must in itself import an agreement to receive in satisfaction, the lawful current medium of that country, unless the contract expressly provides against it, which, on the present occasion, was controverted and denied. In support and illustration of the general position, and its incidents, the following authorities were cited. 2 *Burr.* 1078, 9. 1083. *Dav. Rep.* 26, 7, 8. *Dyer*, 82, 83. 4 *Com. Dig.* 556. *B.* 7, 8. 2 *P. Wms.* 88, 89. 1 *P. Wms.* 696. *Prec. Ch.* 128. 2 *Vern.* 395. 2 *Atk.* 382. 465. *Skin.* 272. 4 *Com. Dig.* 256. *B.* 8. 4 *Vin. Abr.* 258. *O.* 13. *Holt*, 465. *Davis' Rep.* 24. 10 *Mod*, 37. 2 *Br. Chan.* 1 *Smith's Wealth of Nations*, 41. 1 *Dall. Rep.* 257. 1 *Br. Ch.* 376. *Esp. N. P.* 48. 26. 3 *Wils.* 211. *Esp. N. P.* 140, 1. *Doug.* 628. 3 *T. Rep.* 683. 554. 3 *Bl. Com.* 435. *Salk.* 130. 126. 12 *Mod.* 192. *Kyd*, 63.

For Calbraith and Co. it was contended, that an express contract had been proved to pay the bill in specie; that the very terms of the bill import the same understanding of the parties; that however binding the law of *France* may be on cases between *French* citizens, or between *American* and *French* citizens, it did not affect contracts between *Americans*; that, in legal contemplation, there has been neither a payment, nor a tender of payment; and that *Searight* has sustained no damage, nor shown any right to recover. 1 *Pow. on Contr.* 8. 2 *Pow. on Contr.* 158. *Cun. B. of E.* 258. *Skin.* 272. 3 *Watson's Philip* 3, 136. 1 *Ld. Raym.*

Raym. 735. 1 *Lev.* 111. *Esp. N. P.* 169. *Bull. N. P.* 156. 1796.
6 *Mod.* 305. 3 *Burr.* 1353. 2 *Black.* 435. 466. 6 *Mod.* 306.
Davis' Rep. 75, 6. *Skin.* 272.

IREDELL, *Justice.* The contract for the purchase of the bill of exchange is sufficiently proved, as it is laid in the declaration, by the entry made, at the time, in the books of *Calbraith* and Co. The sole question, therefore, in the cause is, whether the tender of assignats, in payment of the bill, was a compliance with that contract? The notarial protest, not only states the tender, but certifies, that assignats were lawful money of *France*, in payment of debts. A notary should, indeed, certify all the facts that occur, in relation to the protest (not merely the refusal to pay, according to the demand) but, it is doubtful, whether his assertion would be conclusive, as to the lawfulness of the money tendered. Connected, however, with other evidence, it is proper for the consideration of the jury.

It has been objected that as *Olivier's* demand was, exclusively, for a payment in *French* crowns, no proof of a tender in any other mode, is necessary; but I do not concur in this opinion. After such a demand, it was, perhaps, unnecessary for the party to exhibit the assignats to *Olivier*; but the form of the demand, on one side, cannot dispense with the obligation, on the other side, to make a tender of payment, agreeably to his own sense of the law and the contract. The jury must, therefore, be satisfied, that although the money was not produced and counted, it was actually in the possession of the party making the tender.

On the principal question, I thought, at first, that the risk, as to the mode of payment, must be run by the holder of the bill; but the case in *Skinner*, 272. sanctioned by the high authority of *Holt's* name, transcribed, without remark, into *Comyn's* excellent digest, and uncontradicted by any other adjudication, must be respected in every Court of law, and completely effaces the first impressions of my mind. Upon examination, too, the doctrine of that book appears to be founded in just and legal principles. Every man is bound to know the laws of his own country; but no man is bound to know the laws of foreign countries. In two cases, indeed, (and, I believe, only in two cases) can foreign laws affect the contracts of *American* citizens: 1st. Where they reside, or trade, in a foreign country; and, 2d. Where the contracts, plainly referring to a foreign country for their execution, adopt and recognize the *lex loci*. The present controversy, therefore, turns upon the fact, whether the parties meant to abide by the law of *France*? And this fact the jury must decide.

As to the damages, if the verdict should be for *Searight*, though it is true that in actions for a breach of contract, a jury should, in general, give the whole money contracted for and interest

1796. rest; yet, in a case like the present, they may modify the demand, and find such damages, as they think adequate to the injury actually sustained. But if the jury should in the first action (*Searight* v. *Calbraith* and Co.) find, either wholly or partially for the defendant; in the second action (*Calbraith* and Co. v. *Searight*) they should find for the defendant generally.

PETERS, *Justice*. The decision depends entirely on the intention of the parties, of which the jury must judge. If a specie payment was meant, a tender in assignats was unavailing. But if the current money of *France* was in view, the tender in assignats was lawfully made, and is sufficiently proved.

When the jury were at the bar, ready to deliver verdicts, the plaintiff in each action, voluntarily suffered a nonsuit. It was afterwards declared, however, that in *Searight* v. *Calbraith* and Co. the verdict would have been, generally, for the defendants; and that in *Calbraith* and Co. v. *Searight*, the verdict would have been for the plaintiffs, but with only six pence damages.

CIRCUIT COURT,

PENNSYLVANIA DISTRICT.

April Term 1797.

Present IREDELL, an Associate Judge of the Supreme Court.
PETERS, District Judge.

Smythe *versus* Banks.

CAPIAS. The defendant was a resident of *Virginia*, and had been subpœnaed as a witness in the case of *Symes's Lessee* v. *Irwine*, which was marked for trial at the present term, but was continued on the 20th of *April*. He was arrested on the 26th of *April*; and the following day, *Levy* moved, that he should be discharged from the arrest and process, on account of the privilege of a witness, *eundo, morando, et redeundo*. 4 *Com. Dig.* 475. 2 *Stra.* 1094. 986. *Vin. Abr. Tit. Priv.*

By the COURT. The witness is, undoubtedly, privileged from arrest, for a reasonable time, to prepare for his departure, and return to his home, as well as during his actual attendance upon the Court. But the privilege does not extend throughout the term, at which the cause is marked for trial; nor will it protect him while the witness is engaged in transacting his general private business, after he is discharged from the obligation of the subpœna.

1797.

Maxfield's Lessee *versus* Levy (1).
The Same *versus* The Same.

THE opinion of the Court was delivered in this case, in the following terms;

IREDELL, *Justice*. A motion was made for a rule to show cause, why these ejectments should not be dismissed, upon an allegation that it appeared, by an answer to a bill in equity, for a discovery in this court, brought by the defendants in these ejectments, against the lessor of the plaintiff, that they are in reality the suits of a citizen of this state (viz. *Samuel Wallis*) though under the name of a citizen of another state, to whom it is alleged, conveyances were made without any consideration, for the sole purpose of making him a nominal lessor of the plaintiff in these ejectments.

A rule to show cause was granted, and, upon the day appointed, the case was fully heard and argued on both sides, the proceedings in equity on the bill for a discovery having been exhibited to the Court and read.

The importance of the present question is evident, because it concerns the constitution and laws of the *United States*, in a point highly essential to their welfare, to wit, the proper boundaries between the authority of a single state, and that of the *United States*.

This, not only the constitution itself has been anxious to ascertain by precise and particular definitions, but the congress, in carrying into effect that part of the constitution which concerns the judiciary, has been solicitous to preserve with the greatest caution. The strong instance of this is a provision in the judicial act, to the following effect:

"That no district or circuit Court shall have cognizance of any "suit to recover the contents of any promissory note, or other "*chose in action*, in favour of an assignee, unless a suit might "have been prosecuted in such Court to recover the said con-"tents, if no assignment had been made, except in cases of "foreign bills of exchange." *Sect.* 11. 1 *vol. p.* 55.

This I adduce as a strong instance to show the solicitude of congress on this subject, for the regulation extends to a *bona fide* assignment in the instances specified, as well as to one *mala fide*: but the provision goes to all, more effectually to prevent any practices of deception by means of the latter.

(1) An outline of this cause was given in 2 *Dall. Rep.* 381. but I comply with the subsequent request of the presiding Judge, (whose death was greatly lamented by the bench and the bar) in publishing the opinion of the Court at large.

Nothing

Nothing is more evident than that if this be a controversy between citizens of different states, it is a controversy determinable in this Court, and of which, therefore, the Court must sustain jurisdiction. 1797.

On the other hand, if it be not a controversy between citizens of different states, but between citizens of the same state, it not being one of those cases which entitle citizens of the same state to any exercise of jurisdiction by this Court, it ought not to be determined here.

But if it shall appear, from a consideration of the facts, that this is not a case which the lessor of the plaintiff was entitled to bring into this Court, it will still remain to be inquired, whether the remedy pursued on the present occasion is proper.

The first question, therefore, is, Whether it sufficiently appears to the Court, that this is a controversy subsisting between citizens of the same state, and not between citizens of different states, so as to authorise a dismission of the suit, in case the remedy be in point of law a proper one?

The evidence, upon which the charge is alleged, is an answer to a bill filed in the equity side of this Court by the defendants in the ejectments, in order to obtain a discovery by the oath of the lessor of the plaintiff.

This is admitted to be competent evidence on a question at law, and therefore (supposing the method of proceeding in other respects proper) I am only to consider, if it affords satisfactory evidence of the facts suggested:

The facts admitted by the answer, in substance, are these:

That there were certain applications to the land-office of this state for 64 tracts of land, in the county of *Luzerne*, containing 27,400 acres: That the applications were made (as the respondent has been informed and believes) by and for the use of *Samuel Wallis* of the county of *Northumberland* in this state: That in *April* 1784, conveyances were executed to *Maxfield* the present lessor of the plaintiff, by which the legal title to the lands therein described was conveyed and assigned to *Maxfield*, as he apprehends and believes. That *Maxfield* paid no consideration, either pecuniary, or of any other nature, for the lands, and, therefore, he apprehends and believes, that the equitable title is in *Samuel Wallis*. That *Maxfield* consented to stand the trustee of the lands, for the use and benefit of *Wallis*, and left the management, direction, and prosecution, of the business to *Wallis*, by whose direction *Maxfield* apprehends and believes, that the *caveats* mentioned in the complainant's bill were filed, and all subsequent proceedings had.

In comparing the facts thus admitted, with the bill he was called upon to answer, it is very remarkable, that the last interrogatory was expressed in such particular and pointed terms, that if it had been directly and positively answered, it would have been

1797. been decisive one way or the other. But it is not so answered, and his own counsel now object, that he did not answer directly to the question, and, therefore, the only remedy was to except to the answer for insufficiency, and compel a better answer.

This objection, I think, may be easily obviated by the following considerations.

1st. If the question had been an improper one, it might have been demurred to. By that not being done, it is confessed that the question was proper, and of course it ought to have been answered. And it is little short of an insult on the Court now to tell it, that the lessor of the plaintiff purposely declined answering a question fairly put to him, which he might and ought to have answered, but by his not doing it he now sets the Court at defiance.

2d. If for want of a fuller answer, *no evidence* was before the Court, the objection might possibly be of weight. But all the other facts admitted by the answer, are open to all proper inferences, as well such as arise from this wilful and insolent omission, as from any other part of the case. The object was to effect a discovery, whether certain conveyances were actually given for the sole purpose of evading the constitutional limits, as to jurisdiction, prescribed to this Court. Such a design could be expected only to be disclosed by direct confession, or a number of concurring circumstances.

3d. It does not appear that he will ever give a better answer. He may chuse to go through all the processes of contempt for not answering sufficiently, as he appears already to have done for not answering at all. He may even submit to perpetual imprisonment. Is the case never to be decided, until he thinks fit to consent it shall be?

4th. The jurisdiction of this Court is not *prima facie* general, but special. A man must assign a good reason for coming here. If the fact is denied, upon which he grounds his right to come here, he must prove it. He, therefore, is the *actor* in the proof; and, consequently, he has no right, where the point is contested, to throw the *onus probandi* on the defendant. As this undoubtedly is the general principle, I see no reason to depart from it on the present occasion, when the knowledge of all the circumstances of the case is fully possessed by the lessor of the plaintiff, and he is regularly called upon to disclose them.

For these reasons, I am clearly of opinion, that *Maxfield's* forbearing to give a fuller answer, is no reason for my not weighing the amount of the answer, which he has thought proper to give; and considering whether it sufficiently establishes the allegations of the defendants in these causes.

But it is objected, that *Maxfield's* answer, though evidence against him, is no evidence against *Wallis*, who is said to be the *cestui que trust*, and *Maxfield* a bare trustee.

Answer.

Answer. Upon the face of these ejectments *Wallis's* name no where appears. *Maxfield*, therefore, is the only person to be considered here. If a *cestui que trust* has a right to support an ejectment, but is forced, upon legal principles, to use the name of his trustee, he must take the consequences. This Court, as a Court of law, cannot punish the trustee for a breach of trust, though in another capacity it may. But if it had been material to have made *Wallis* a party, a great, if not an insuperable, difficulty has been alleged in doing it. *Wallis* and the defendants being citizens of the same state, it is very doubtful whether a bill in equity would have lain against *Wallis* in this Court, though it was merely incidental to the suit at law. But, it is clear, that the objection in this case is merely frivolous, because upon the return of the rule to show cause, an *ex parte* affidavit might be produced. *Wallis's* affidavit undoubtedly might have been, as well as any others. Why has it not been? No reason has been assigned to show it could not be done, or that he desired, or that his counsel wished, he should do it. Nor has time been solicited for his putting in such an affidavit, though it is so seriously alleged, that it was highly important to him to have had an opportunity of answering this charge. 1797.

It is alleged, that *Maxfield* was a trustee, and as such authorised to come into this Court.

A trustee for what purpose? There is not the least shadow of evidence, that he was a trustee for any other purpose, than that *Wallis* should have a colour for suing in this Court, in his name. The deed is not even stated to have been delivered. No fair object of the trust is specified. *Wallis* lived in *Pennsylvania*; the land lies in *Pennsylvania*: *Maxfield* lived in *Delaware*. What was he to do? It appears, from his own acknowledgment, that he has done nothing hitherto, nor does he state he was to do any thing.

But, it is said, a man is not obliged to specify any object of a trust. He may create a trust from *mere whim*.

Admitted. But the law cannot, without absurdity, permit a man to create a trust, for the purpose of defeating a solemn provision of its own. Nothing could be more ridiculous than such a principle. When the constitution has guarded, with the utmost solicitude, against the exercise of a particular authority, so as that, under certain circumstances, one man shall not sue another in a Court created under it, can such a Court for a moment support a doctrine, that it shall be in the power of such a man, *by any contrivance expressly calculated to defeat this object*, to render it wholly nugatory? This, indeed, would be to render the laws of our country a farce; to make the constitution a mere shadow; and deservedly to draw upon those entrusted with its execution, an odium which has been industriously, but, I hope, will ever be in vain attempted.

But

1797.

But it is said, the system of fictions is not new; and an attempt has been gravely made to induce this Court, by flattering expressions, to add to the list of fictions in being, one of its own, in the face of the constitution we are sworn to support, and by every other sacred tie bound to maintain inviolate.

It is true, the Courts of law in *England* have countenanced and supported some fictions. Such (for instance) as a fine and recovery, and an ejectment; and, still more exceptionably, fictions to give a jurisdiction, which otherwise could not be maintained. It is sufficient to say of all these, that they originally took place, when very dark notions of law and liberty were entertained; that they are supported now solely on the authority of long usage; and that no Court would now dare to set up a new one. No Court in *America* ever yet thought, nor, I hope, ever will, of acquiring jurisdiction by a fiction. And the only fiction ever in general use in *America* (perhaps with a few exceptions as to fines and recoveries) I believe, has been that of proceeding by ejectment, which is a mere form of action, and so modified as to do no possible injury. It cannot substantially affect any man's right whatever.

In order to encourage the Court to countenance this scheme, it is said that no injury can arise from this practice, because the decision in this Court will be on the same principles, and, it is to be presumed, with an equal regard to justice, in this Court, as in a state Court.

If a serious answer to such an observation is required, it is surely evident, that we are not to assume a voluntary jurisdiction, because, we think, or any others may think, it may be exercised innocently, or even wisely. The Court is not to fix the bounds of its own jurisdiction, according to its own discretion. A jurisdiction assumed without authority, would be equally an usurpation, whether exercised wisely, or unwisely. But the fact assumed cannot be admitted to be true. If this Court exercise a jurisdiction in such a case, it may do so after all avenues to a state jurisdiction are for ever closed. That is alleged to be the fact in the present instance. There are, also, other differences, such as regard the place of trial, the venue of the jurors, and other circumstances omitted to be mentioned, because this part of the case is too plain to require any formal discussion.

On this occasion, it may be material to consider whether, on the facts now apparent to the Court, *Maxfield* has any title, either in equity, or at law; because, if he has not, it is evident, the title to be contested must be *Wallis's*, and not his; and, of course, the subject matter to be decided, is a title in question between two citizens of the same state.

1st. As to equity.

He has none by his own acknowledgment. He paid no consideration. He is to perform no duty. He only permits his name

to

to be used, for the support of a fraud on the jurisdiction of the Court; a purpose which a Court of equity would reject with the highest disdain. 1797.

2d. As little, in my opinion, can he support any title at law.

1st. Consider this as a mere bargain and sale. A bargain and sale is of no validity, where no money has been paid. Nothing gives a legal title under the act of *H.* 8. (concerning uses) which was not an equitable one before that statute. At that time no bargainee could have compelled a bargainor to convey, who had received no money. Therefore, since the statute, no use can arise on such a deed, without some money to support it.

2d. Allowing the highest efficacy to this deed under the act of assembly. This can only mean, that what a man can lawfully grant by any form of conveyance, shall be sufficiently granted in this form. Of course, if under any other form of conveyance, owing to technical difficulties, such a purpose could succeed without redress, a deed, professedly a bargain and sale, is not to have its influence extended, merely that an illegal purpose should take effect, under colour of form. The intent of the act certainly was, that the want of form should not defeat the intention of an honest, but unskilful conveyance; but surely not to smooth the path of injustice, by converting a rightful estate into a wrongful one.

3d. But admitting it to be any form of conveyance you please, then I say, that a Court of law will not, any more than a Court of equity, support a deed *formally good*, but *substantially fraudulent*. And whether the fraud be of a moral nature, for the purpose of doing a wilful injustice, or the act be, as the lawyers term it, *in fraudem legis* (that is, to evade some law) the law will equally interpose, to prevent its own principles from being made mere instruments, to defeat its own purposes.

There is no act in law, within my recollection, which fraud will not vitiate.

It will vitiate a feoffment, which is a very strict conveyance, requiring no consideration, and passes by an actual livery.

It will vitiate a fine, though a solemn transaction in a Court of justice, and peculiarly favoured.

It will even deprive a party of the benefit of a judgment deliberately given.

Conveyances to defeat creditors (however formally agreeable to law) are held absolutely void, at least as against them.

So, also, in the common case of usury, for which so many contrivances have been devised. No contrivance, no colour, no form whatever, can protect any transaction, which really appears to have been usurious, from being declared so.

The application of these principles is obvious.

If (as I observed before) the deed in question is to be considered as a mere bargain and sale, it is absolutely void for want of a legal consideration (which must be money alone) to support it.

1797. it. If it is to be considered as any other kind of conveyance, it having no consideration whatever but an illegal one (that of defeating the constitution and laws of the *United States* in a most essential point) it is at least void as to that purpose, and, therefore, does not authorise *Maxfield* to come into this Court.

I, therefore, conclude without difficulty, that *Maxfield* has neither a legal, nor an equitable, title to authorise him to come into this Court.

The only remaining consideration is, as to the remedy, which, from the first, was the only difficulty I found.

I will venture to lay it down as an unquestionable principle, that no grievance can arise in the law, but some remedy may be applied to it. The present grievance, therefore (which, if unredressed, will, in any case like the present, enable two persons, at their pleasure, to do injustice to a third, and force this Court to exercise a jurisdiction never delegated to it) must admit of some remedy.

Only three have been suggested, in the present stage of the proceeding.

1st. The method now under consideration.

2d. A plea to the jurisdiction.

3d. An injunction in equity.

I will consider the two last first; for, if they are removed out of the way (as I think they must be) it will facilitate our consideration of the first.

As to a plea to the jurisdiction. This can be of no avail, unless not only the fact, at the proper time of pleading, be known to the defendant, but that he has disinterested proof of it. This, in a thousand instances, would be impossible; and in no instance can be expected. To insist on this, therefore, as the only method, would leave the constitution, and the law, in almost every instance, open to certain evasion. It consequently cannot be admitted, that this is the only method of redress.

With regard to a bill in equity. I will not say, equity ought not to interpose a remedy in any case. But it seems most proper, that a Court of law should support its own jurisdiction, on its own principles, and, if proof can be obtained, I conceive it is necessarily incident to every Court to take care, that its jurisdiction be not encroached upon, or in other words, that the Court be not made either voluntarily, or involuntarily (if it can prevent it) an usurper of jurisdiction not belonging to it. In this case, the aid of equity may be useful (as it has been on the present occasion) in compelling a discovery; but there, I think, its interference ought to stop, unless the power of the law Court over the action has entirely ceased; as for instance, after a judgment, in which case (but in which, perhaps, alone) equity might properly grant an injunction, to prevent a party availing himself of his own fraud.

The

The only remaining remedy suggested (or which occurs to me) in the present stage of the proceeding, is that now under consideration; and, of course, this must be adopted, if an interference by the Court in the present stage of the cause is proper. 1797.

It is, however, objected, that the Court ought not to interfere at present, but permit the case to go before the jury, who may find for the defendants, if they believe the facts suggested, and apply the law accordingly.

If this case had, indeed, gone before the jury, I should have had no difficulty in telling them, that admitting the truth of the facts as stated, the lessor of the plaintiff had, in my opinion, no title; and, if the jury had found accordingly, redress (though late) could be obtained.

But, at present, I do not think myself at liberty to submit the case to the jury, for the following reasons.

1st. The Court is the proper guardian of its own jurisdiction. It is alone responsible for it, and must, therefore, take care that it neither abandons a jurisdiction rightfully belonging to it, nor usurps that which does not.

2d. Admitting that a plea to the jurisdiction is not the only remedy, for the reasons I have given, upon complaint made of any fraud on the jurisdiction having been practised, if the complaint is supported on good grounds, it is just that an immediate inquiry should be made into it, in order that if any injury to a party has been hitherto unavoidably sustained by any such fraud, it may be put a stop to, as soon as possible. To compel a party, in such a case, to stay in Court, until a jury shall be summoned and convened, to try a general issue, would be a voluntary exercise of jurisdiction, after the Court entertained reason to doubt, at least, whether they had any.

3d. To swear a jury is an exercise of jurisdiction. With what propriety can I order that, after being fully convinced from evidence, admitted to be competent, that the Court hath no jurisdiction at all?

4th. Suppose the jury in this case should find for the plaintiff, when the Court was thoroughly convinced it had no jurisdiction of the cause? Can the Court give judgment for the plaintiff in such a case? Surely not. If, therefore, a verdict to that effect, could produce no good, why should a verdict be required of them? Because this would not be an ordinary case concerning a new trial; in which case, after two or three verdicts the same way, a Court might be compelled to stop, and proceed no further. But if there were a hundred verdicts in a case, in their opinion, not within their jurisdiction, they could not give judgment without voluntarily usurping a power not belonging to them.

5th. In this case there is no occasion for a jury *to try the facts*, because the facts are not denied, and the Court surely will not

1797. not call a jury to decide a question of law, and a question which, as I have just observed, they could not decide finally.

Maxfield's allegations in this case, are either a direct confession, or as to some points (if the expression is proper) a *nil dicit*. In neither case is a jury wanting. A complete denial can alone entitle a party to have facts tried by a jury. There is no denial in this case but of the merits, upon which a jury can be sworn; which certainly would be premature when facts had already been confessed sufficient to oust the jurisdiction. Had he positively denied, indeed, the allegations of the bill in equity, the jury must have been sworn; for, as a Judge, I certainly could not, in any shape, determine on an issue of fact.

But as he has not thought proper to deny them, but, in my opinion, substantially confessed every thing, to show that the Court had no jurisdiction of the cause; I consider myself bound to order these ejectments to be dismissed, and do accordingly order them to be dismissed with costs. (1)

Here one of the counsel interfered, and asked the Judge whether he would order costs in a case where he declared the Court had no jurisdiction.

The Judge answered, That that circumstance did not occur to him; he acknowledged he had committed a mistake in that part of the order. But, if it was in his power, he would order double costs. (2)

(1) Mr. *William Tilghman*, one of the counsel for the defendants, quoted a case in *Saviry's Reports*, *p.* 12. which Judge IREDELL thought much in point, and meant to have declared so, in delivering his opinion, but inadvertently omitted it.

See *Worlay* v. *Harrison*, *Dyer*, 249. 2 *Inst.* 215. 21 *Viner*, 535, 536. *tit. Vacat.*

(2) In the case of *Bowne's Lessee* v. *Aurbuckle*, in the Circuit Court, at *October* term 1806, it appeared, upon bill and answer on the equity side of the Court, that the lessor of the plaintiff was a citizen of the state of *New-York*, and the defendant was a citizen of *Pennsylvania*; that the former was a member of the population company, who had purchased extensive tracts of land, on the north-western boundary of *Pennsylvania*; that the land, so purchased, was held by trustees (all citizens of *Pennsylvania*) for the use of the company; that the trustees had conveyed to the lessor of the plaintiff his portion of the land (including the premises mentioned in the declaration) in severalty; and that the present ejectment was founded upon that conveyance.

The defendant, upon these facts, and upon the authority of *Maxwell's Lessee* v. *Levy*, and *Hurst* v. *Hurst*, moved to strike from the record this ejectment, and others in the same predicament. But the motion was over-ruled by the Court; and this distinction taken:

WASHINGTON, *Justice*. In the cases cited, the deeds were executed, with a collusive intention, to give a jurisdiction to the Court, which the Court could not possess without them. The objection proceeded on two grounds: 1st. On the equity of the statute provision, which declares, that a suit shall not be maintained in a federal Court, by the assignee of a promissory note, or other chose in action (with the single exception of foreign bills of exchange) unless

unless it could have been brought there, by the original party. And, 2d. On the manifest attempt, by a fraud, to create jurisdiction. But in the case now under consideration, the lessor of the plaintiff would have had a right, as a citizen of *New-York*, to apply to the equity side of the Court, to compel the trustees to convey his share of the trust estate to him: and if the trustees have only voluntarily made a conveyance, which the Court would have decreed, surely we cannot call it a fraudulent deed, or refuse to take cognizance of a suit founded upon it, between a citizen of *New-York*, and a citizen of *Pennsylvania*. 1797.

CIRCUIT COURT,

PENNSYLVANIA DISTRICT.

April Term 1800.

Present CHASE, an Associate Judge of the Supreme Court.
PETERS, District Judge.

O'Harra *versus* Hall.

CASE. This was an action brought by the assignee of a bond, against the assignor, upon a written assignment, in general terms. On the trial, *Ingersoll*, for the plaintiff, offered parol testimony to show, that the defendant had expressly guaranteed the payment of the bond. *W. Tilghman* objected, that as the contract of the parties was in writing, no parol testimony could be admitted, on a trial at law, to vary its expressions and import. *Ingersoll* replied, that wherever there is an oral misrepresentation at the time of a sale, or transfer, even though the principal bargain is reduced to writing, the misrepresentation may be proved. A Court of equity would, in such case, grant relief; and even the Courts of law are now accustomed to regard actions on the case, like the present, as bills in equity. *Moses* v. *M'Farlan*. 2 *Burr*. 1005. 1 *Dall. Rep*. 428.

CHASE, *Justice*. You may explain, but you cannot alter, a written contract, by parol testimony. A case of *explanation*, implies uncertainty, ambiguity, and doubt, upon the face of the writing. But the proposition now, is a plain case of *alteration*: that is, an offer to prove by witnesses, that the assignor promised something, beyond the plain words and meaning of his written contract. Such evidence is inadmissible; and has been so adjudged by the Supreme Court, in *Clarke* v. *Russel*, 3 *Dall. Rep*. 415. As to the authority of *Moses* v. *M'Farlan*, it has always been suspected, and has lately been over-ruled, on the principle, that

that the previous decision, there brought into question, was pronounced by a competent Court. 1800.

I grant, that chancery will not confine itself to the strict rule, in cases of fraud, and of trust. But we are sitting as Judges at common law; and I can perceive no reason to depart from it.

PETERS, *Justice.* If we were sitting as Judges in a state Court, I should be inclined to admit the testimony, in order to attain the real justice of the cause; as there is no Court of equity in *Pennsylvania.* But there is no such defect in the federal jurisdiction; and, therefore, when the party comes to the common law side of the Court, he must be content with the strict common law rule of evidence.

The United States *versus* Cooper.

THE defendant, being indicted for a libel on the President, applied to the Court, for a letter to be addressed by them, to several members of congress (congress being in session) requesting their attendance as witnesses, on his behalf. In support of the application, a variety of similar cases arising under the government of *Pennsylvania*, were referred to.

CHASE, *Justice.* The constitution gives to every man, charged with an offence, the benefit of compulsory process, to secure the attendance of his witnesses. I do not know of any privilege to exempt members of congress from the service, or the obligations, of a *subpœna*, in such cases. I will not sign any letter of the kind proposed. If, upon service of a *subpœna*, the members of congress do not attend, a different question may arise; and it will then be time enough to decide, whether an attachment ought, or ought not, to issue. It is not a necessary consequence of non-attendance, after the service of a *subpœna*, that an attachment shall issue. A satisfactory reason may appear to the Court, to justify, or excuse, it.

PETERS, *Justice.* I know the practice in *Pennsylvania* to be as it has been stated; for, I have received such letters, from the Supreme Court, while I was speaker of the house of representatives, requesting that members might be permitted to attend as witnesses. In the present case, I should have no objection to acquiesce in the defendant's application, with the concurrence of the presiding Judge.

Motion refused.

Murgatroyd

1800.

Murgatroyd *versus* M'Lure.

REPLEVIN, for the ship *Mount Vernon*. The defendant claimed property, under a capture and condemnation as prize, in the *French* Court of Prizes, established at the city of *St. Domingo*, in the island of *St. Domingo*, under the circumstances stated in the reports of the trials, relative to the same ship. 3 *Dall. Rep.* 491. *Murgatroyd* v. *Crawford*. *Ante*, 308. *Duncanson* v. *M'Lure*. After hearing the evidence,

CHASE, *Justice*, declared, that the whole trasaction, between *Murgatroyd* and *Duncanson*, was a mere cover, to evade the laws of the *United States*; that the former was a mere trustee for the latter; and that having been paid the full price for the ship, he had no property, on which the replevin could be maintained.

The plaintiff suffered a non-suit.

Evans, *qui tam*, &c. *versus* Bollen.

THIS was a *qui tam* action, in which the following declaration was filed:

" *October* Session 1797.

" In the Circuit Court of the *United States* for the *Pennsylvania* " District of the Middle Circuit.

" District of *Pennsylvania*, *ss.*

" *George Bollen*, late of the district of *Pennsylvania*, yeoman, " was summoned to answer to the *United States* and to *John* " *Evans*, who sues in this behalf, as well for the said *United* " *States* as for himself, of a plea that he render to the said " *United States*, and to the said *John* who sues as aforesaid, the " sum of two thousand dollars, which to them he owes, and from " them unjustly detains: and whereupon the said *John*, who sues " in this behalf, as well for the said *United States*, as for himself, " by *Joseph Thomas* his attorney, saith that the said *George*, on " the first day of *April* in the year of our Lord one thousand " seven hundred and ninety-seven, at the port of *New-York*, to " wit, at the district aforesaid, was aiding and abetting, in pre- " paring and sending away from a port within the said *United* " *States*, to wit, from the port of *New-York*, a certain vessel " called the *Betsey*, intending that the same should be employed " for the purpose of procuring from a foreign country, to wit, " from the coast of *Africa*, the inhabitants of such foreign coun- " try, to be transported to a foreign country, to wit, to the island " of *Saint Croix*, to be disposed of as slaves, against the form of " the statute in such case made and provided; by means where-

" of,

" of, and by force of the statute in such case made and provided, 1800.
" an action hath accrued to the said *John*, who sues in this be-
" half, as well for the said *United States*, as for himself, to have
" and demand of and from the said *George* the said sum of two
" thousand dollars: yet the said *George* (although often request-
" ed) hath not paid the said two thousand dollars, or any part
" thereof, to the said *John*, who in this behalf sues for the *United*
" *States* as well as for himself, but the same to him to pay hath
" hitherto wholly refused, and still doth refuse, to the damage
" of the said *John*, who sues as aforesaid, five hundred dollars.
" And thereof he brings suit, &c.

" Pledges, &c. { JOHN DOE.
RICHARD ROE.

Joseph Thomas, attorney for plaintiff.

The action was founded on the act of congres, " to prohibit " the carrying on the slave trade, from the *United States* to any " foreign place or country," (3 *vol.* 22. *Swift's edit.*) of which the following were the material sections, in the discussion:

Sect. 1. " *Be it enacted*, &c. That no citizen or citizens of the " *United States*, or foreigner, or any other person coming into, " or residing within the same, shall, for himself or any other per- " son whatsoever, either as master, factor, or owner, build, fit, " equip, load, or otherwise prepare any ship or vessel, within any " port or place of the said *United States*, nor shall cause any ship " or vessel to sail from any port or place within the same, for " the purpose of carrying on any trade or traffic in slaves, to any " foreign country; or for the purpose of procuring, from any fo- " reign kingdom, place, or country, the inhabitants of such king- " dom, place, or country, to be transported to any foreign coun- " try, port, or place whatever, to be sold or disposed of, as slaves: " and if any ship or vessel shall be so fitted out, as aforesaid, for " the said purposes, or shall be caused to sail, so as aforesaid, " every such ship or vessel, her tackel, furniture, apparel, and " other appurtenances, shall be forfeited to the *United States*; " and shall be liable to be seized, prosecuted, and condemned, in " any of the Circuit Courts, or District Court for the district, " where the said ship or vessel may be found and seized.

Sect. 2. " *And be it further enacted*, That all and every person, " so building, fitting out, equipping, loading, or otherwise pre- " paring, or sending away, any ship or vessel, knowing, or in- " tending, that the same shall be employed in such trade or busi- " ness, contrary to the true intent and meaning of this act, or any " ways aiding or abetting therein, shall severally forfeit and pay " the sum of two thousand dollars, one moiety thereof to the use " of the *United States*, and the other moiety thereof to the use " of him or her who shall sue for and prosecute the same."

The

1800. The facts were proved, as stated in the declaration, but the defendant's counsel made two objections to the jurisdiction of the Court: 1st. That this was a suit under the second section, and the Circuit Court could not take original cognizance of a case of penalty, or forfeiture, as the judicial act expressly declared, that the District Court should have "exclusive original "cognizance of all suits for forfeitures and penalties incurred "under the laws of the *United States*." 1 *vol. p.* 53, 4. *s.* 9. 2d. That the offence was committed, in the state of *New-York*; and ought to be tried there, upon the principles of the common law, adopted by the constitution of the *United States*, and various acts of congress. *Const. art.* 3. *s.* 2. 1 *vol.* 29. *s.* 67. *Amendm. Const. art.* 8, 9. 4 *Black. Com.* 350. 3 *Bl. Com.* 359, 360. 2 *Dall. Rep.* 335.

It was agreed, that a verdict should be given for the plaintiff, subject to the opinion of the Court on these points; and after argument by *E. Tilghman*, for the plaintiff, and *Levy*, for the defendant,

The COURT declared, that they had no jurisdiction of the cause; and directed a *non pros.* to be entered.

CIRCUIT COURT,

PENNSYLVANIA DISTRICT.

October Term 1800.

Present PATERSON, Associate Judge of the Supreme Court.
PETERS, District Judge.

Hollingsworth *versus* Fry.

IN equity. The bill, after setting forth a variety of transactions between the parties, relative to a tract of land, mills, and mill race, in *Dauphin* county, states, that on the trial of a writ of partition for the premises, they consented to withdraw a juror, and entered into the following agreement, dated the 19th of *November* 1790:

"It is mutually agreed, that judgment shall be entered for the "defendant on the day in bank, on the 3d of *January* next, un- "less the said plaintiff, or *Robert Ralston*, his assignee, shall "previous thereto, by such good and unexceptionable securities, "in such sum, and in such manner, as shall be approved of by the "honourable Judges of this Court, engage for, and secure, the "payment of one moiety of all monies, which the defendant "hath advanced, or expended, or shall appear to be reasonably "entitled to, for, or by reason of, his improvement of the lands "in question, or for any matter relative thereto, or of any other "lands held in common, or jointly, between the said parties, "within six months from the said 3d day of *January* next. But, "in case such unexceptionable security shall be given, and a "question shall arise as to the quantum of the monies, to which "the defendant shall be entitled, then *John Kean*, *Joshua Elder*, "and *John Carson*, gentlemen, or any two of them, shall deter- "mine the said sum, on full hearing of the said parties, their "witnesses, and proofs. And in case of a full conformity there-

1800. "to, and the money being fully paid and discharged as afore-
"said, within the said period of six months, and not otherwise,
"that then judgment shall be entered in this action, not only for
"the lands in the declaration mentioned, but of all lands and
"mills held jointly, or in common between them the said par-
"ties, by virtue of any article between them, or between them
"and *John Fisher*, made. But if the monies so due shall not be
"paid and discharged within the said period, the defendant shall
"hold the said lands free and discharged from the claims of the
"said plaintiff, and all persons claiming under him; and judg-
"ment shall in such case be entered for him in this action."

It, also, appeared from the pleadings and exhibits that the bond, required by the agreement, was duly executed on the part of the plaintiff; that the referees undertook the business of the reference; and that on the 13th of *April* 1791, the following report was filed:

"We the referees, &c. report that, after hearing the parties, "their allegations, and witnesses, and investigating their accounts "and vouchers, we are of opinion, that *George Fry* is reasonably "entitled to the sum of 3646*l.* 6*s.* 2¾*d.* specie; that being the one "moiety, or half part, of his expenditures on the lands, mills, and "their appurtenances, in question, after giving *John Hollings-*"*worth* credit for the money by him expended on the same "lands."

It, also, appeared, that the plaintiff filed a number of exceptions, which the Supreme Court, after argument, over-ruled on the 2d of *July* 1791, and gave judgment on the report; and that, on the 26th of *September* 1796, the complainant sent his son, to tender to the defendant, the amount of the report, in his favour; which the defendant refused to accept.

Upon these general premises, the bill proceeded to complain, that the defendant had appeared in the Supreme Court, by his counsel, on the 2d of *July* 1791, alleging the exceptions to the report to be untrue, whereas the complainant avers that they were true; that although notice had been given to produce books and accounts, none were produced on the hearing in Court; that the conduct of the referees was improper in various particulars; that the books, accounts, and statements, laid by the defendant before the referees, were untrue and fraudulent; that the defendant suppressed several material documents, which he alone possessed; and that the value of a moiety of the property in dispute is at least 10,000*l.*

The bill concluded with a prayer for a perpetual injunction, against all proceedings on the judgment; for a discovery and account; for a partition of the premises; and for general relief.

To

To this bill, the defendant filed a plea and answer: 1st. Plea in bar, a former bill in equity, for the same cause, filed by the complainant on the 24th of *April* 1792; demurrer to the bill, and joinder in demurrer; and a decree, in *April* term 1796, pronouncing the demurrer to be sufficient, and dismissing the bill; which decree remains unreversed and in full force. 2d. Plea in bar, the judgment of the Supreme Court of *Pennsylvania*, (a competent tribunal) upon the agreement, reference, and report, which judgment remains still in force; with an averment that the complainant did not, within six months after making, or filing, the report, nor after the exceptions were over-ruled (which exceptions contained all the matter alleged in the bill) and the judgment rendered, pay, or offer to pay, to the defendant, the said sum of 3646*l.* 6*s.* 2½*d.* or any part thereof. 3d. Answer, That the judgment was fairly obtained; that the defendant did not submit to the referees any books, accounts, or statements, that were untrue, or fraudulent, nor suppress any material documents; that on the 26th of *September* 1796, the complainant's son came to him with a bank bill; but never before that time; and that the defendant had been exposed to all intermediate expenses and casualties, &c. 1800.

A general replication was filed; and, after argument, the following opinion was delivered, Judge PETERS, declining to take a part in the decision:

PATERSON, *Justice*. The great rule of interpretation, with respect to deeds and contracts, is to put such a construction upon them as will effectuate the intention of the parties, if such intention be consistent with the principles of law. In the present case, there is no difficulty in coming at the intention, as it is clearly and forcibly expressed in the agreement, and is capable of receiving one construction only. The time of payment is made a substantial, and not a mere formal, circumstance; it enters into the essence of the contract; and, therefore, must be observed. The Court cannot decree against the legal and express stipulation of the parties themselves. The situation of the parties, the nature of the property, and the speculative spirit of the project, were powerful inducements for drawing up the agreement, in the plainest and strongest terms, so as to leave no doubt as to the intention, and to render the time of performance a cardinal point.

Again, if the agreement would admit of another construction, the complainant, under the circumstances of the case, comes too late to avail himself of it. The door of equity cannot remain open for ever. The complainant did not make a tender of the money, till a lapse of five years after the termination of the time limited by the contract. So far was he from using legal diligence, that he has been guilty of gross delay. In cases of the present kind, equity will not suffer a party to lie by till the event of the experiment

1800. experiment shall enable him to make his election with certainty of profit one way, and without loss any way. This mode of procedure is unfair; contrary to natural justice, and in exclusion of mutuality.

There is a strange mixture of legal and equitable powers, in the Courts of law of this state. This arises from the want of a distinct forum to exercise chancery jurisdiction; and, therefore, the common law Courts equitise as far as possible. Whether, if relief be proper, the Supreme Court of this state could have extended it to the complainant, it is unnecessary to determine. Thus much, however, might and ought to have been done, on the part of the complainant; he ought, when notice was given for him to show cause why judgment should not be entered, to have laid the equity of the case before the judges of that Court, who, if they thought proper, might have deferred the entering of judgment, or ordered it to be entered on terms, to wit, to be vacated on payment of the awarded sum, by a limited period. But the complainant, although he had previous notice, did not avail himself of an appeal to the discretion of the Court; but suffered judgment to pass against him, without making any objection.

There being no equity in the complainant's case, his bill must be dismissed, with costs.

Thurston *versus* Koch.

THIS cause came before the Court on the following case, stated by the counsel, *Condy*, for the plaintiff, and *Ingersoll*, for the defendant.

"On the 13th of *October* 1796, *William I. Vredenburgh*, of the "city of *New-York*, merchant, caused himself to be insured, at "the city of *New-York*, in a certain policy of insurance, which "was subscribed by the plaintiff, in the sum of 14,500 dollars, "upon any kind of goods and merchandise, laden, or to be "laden, on board the brigantine *Nancy*, captain *King*, master, "lost, or not lost, at and from any port and ports in the *West-*"*Indies*, and at and from thence to *New-York*, and there safely "landed, beginning the adventure upon the said goods and mer-"chandises, from the lading thereof on board the said vessel, at "the *West-Indies*.

"On the 17th of *October* 1796, the said *William I. Vreden-*"*burgh*, by *Jacob Sperry* and Co. his agents, caused himself to "be insured, at the city of *Philadelphia*, in a certain other policy "of insurance, which was subscribed by the defendant, in the "sum of 1300 dollars, with other underwriters, in the whole "amounting to 12,000 dollars, upon all kinds of lawful goods, "and merchandises, lost, or not lost, laden, or to be laden, on

"board

board the said brigantine *Nancy*, at and from *Cape Nichola* 1800.
" *Mole*, to any ports and places in the *West-Indies*, to trade, and
" at and from either of them to *New-York*, beginning the adven-
" ture from and immediately following the loading thereof on
" board the said brigantine at *Cape Nichola Mole*, and so to con-
" tinue until safely landed at any ports and places in the *West-*
" *Indies*, and at *New-York* aforesaid. The premium demanded
" upon this policy, was ten per cent. and was duly paid by the
" said *Jacob Sperry* and Co. on behalf of the said *William I.*
" *Vredenburgh*, to the defendant and the other underwriters
" upon this policy.

" On the 20th of *October* 1796, the said *William I. Vreden-*
" *burgh*, caused himself to be insured, at the city of *New-York*,
" in a certain other policy of insurance, which was subscribed by
" the *New-York* insurance company, for the sum of 2,200 dol-
" lars, upon all kinds of lawful goods and merchandises, lost, or
" not lost, laden, or to be laden, on board the said brigantine
" *Nancy*, at and from any port or ports in the *West-Indies*, to
" *New-York*, beginning the adventure from the loading thereof
" on board the said brigantine, at any port or ports in the *West-*
" *Indies*, and so to continue until safely landed at *New-York*, &c.

" On the 12th day of *September* 1796, the said brigantine
" *Nancy*, with the said goods and merchandises, so laden on
" board, and insured and covered by the said policies as afore-
" said, sailed from *Cape Nichola Mole*, in the *West-Indies*, for *St.*
" *Marks*, likewise in the *West-Indies*, and in the prosecution of
" the said voyage, from *Cape Nichola Mole* to *St. Marks* afore-
" said, with her cargo, including the said goods and merchan-
" dises, so insured as aforesaid, was captured by a *French* pri-
" vateer, and condemned; by which capture, the said goods and
" merchandises were wholly lost to the insured. Upon this,
" suits were brought into the Supreme Court of the state of
" *New-York*, against the plaintiff, upon the policy by him sub-
" scribed, and against the *New-York* insurance company, on the
" policy by them subscribed; in which suits, the insured, the said
" *William I. Vredenburgh*, recovered as for a total loss.

" The amount paid by the plaintiff (after the usual deductions)
" for the loss, was 12,740 dollars, with 1783 dollars and 60 cents
" interest, and 418 dollars and 32 cents costs. He has, likewise,
" paid, to the said assured, 1083 dollars and 60 cents, being the
" amount of the premium upon the policy subscribed by the de-
" fendants (after the deductions allowed in the case of a returned
" premium) as a consideration for the assignment of the said
" policy to the plaintiff. The *New-York* insurance company have
" paid to the assured 2156 dollars, being the amount of their
" policy (after the usual deduction in case of loss) with 301 dol-
" lars 84 cents interest. The several sums so paid, have com-
" pletely satisfied the loss, with all the interest and costs.

" Question

1800.

"Question for the opinion of the Court. Is the defendant "(one of the underwriters, on the *Philadelphia* policy, of the 17th "of *October* 1796) liable to make any, and, if any, what contribu- "tion to the plaintiff, upon the loss so paid as aforesaid by him? "Or, in other words, Is the defendant liable to pay more than the "amount of the loss, beyond the sum previously insured?

"If the Court shall be of opinion in the affirmative, then judg- "ment shall be entered for the plaintiff, in such sum as, upon the "principles established by the Court, shall be found due. But, "if the Court shall be of opinion in the negative, then judgment "shall be entered for the defendant."

After argument, the opinion of the COURT was delivered by the presiding Judge, in the following terms:

PATERSON, *Justice.* The case before the Court is that of a double insurance; and the question is, whether the insurers shall contribute rateably, or shall pay according to priority of contract, until the insured be satisfied to the amount of his loss. The law on this subject, is different in different nations of *Europe*, owing to the diversity of local ordinances, which have been made to regulate commercial transactions. By the ordinance of one country, the contract is declared to be void, and a forfeiture superadded; whereas, by the ordinances of other countries, the contract is merely void, without any forfeiture. By the ordinance of *Spain*, if a policy be signed on the same day by several persons, the first signer becomes first responsible, and so on till the insured receive full satisfaction to the value of his loss; the posterior insurers being liable only for the deficiency, and that, too, according to the order of priority. But, in such case, by the ordinance of *France*, the several insurers, on the same day, shall contribute rateably to make up the loss; whereas, by the same ordinance, if the policies bear date on different days, the rate of contribution is rejected, and that of priority established; or, in other words, if the first policy absorb the loss, or amount to the value of the goods insured, the posterior insurers are not liable, but shall withdraw their insurances, after retaining a certain per centage. The solvency of the first insurer to the full value being assumed, the ordinance is predicated on the principle, that there remains no property to be insured, and, of course, no risk to be run. But suppose the solvency of the first insurer should become doubtful, what course is to be pursued? As this is a risk, it ought to be provided against; and, accordingly, we find, that some of these ordinances have declared, that such insurer's solvability may be insured. It is obvious, that this is a point of great delicacy; for, by questioning the solvency of a merchant, you wound his credit, and, perhaps, cast him into a state of bankruptcy. Most, if not all, of these ordinances, are of ancient date, and were calculated for the then existing state of commerce in the

the several countries, which formed them. It is, however, evident, 1800.
that the law merchant varies in different nations, and even in
the same nation at different times. The course of trade, local
circumstances, commercial interests, and national policy, induce
to some variation of the rule. The law in this particular, as it
was understood and practised in *England*, prior to, and at the
commencement of, our revolution, was different from the rule,
which prevailed in *France*, *Spain*, and other countries, under their
local ordinances. A double insurance is, where the same man is
to receive two sums instead of one, or the same sum twice over
for the same loss, by reason of his having made two insurances
upon the same ship, or goods. In such case the risk must be the
same. This kind of insurance is agreeable to the practice and
law of *England*, and is considered as being founded in utility,
convenience, and policy. In the case of *Godin* and others v. *The
London Assurance Company*, in *February* 1758, Lord *Mansfield*,
in delivering the opinion of the Court, expressed himself as fol-
lows:

"*As* between *them*, and upon the foot of commutative justice
"merely, there is no colour why the insurers should not pay the
"insured the *whole:* for they have received a *premium* for the
"*whole* risk.

"Before the introduction of *wagering* policies, it was, upon
"principles of convenience, very wisely established, 'that a man
"should *not* recover *more* than he had lost.' Insurance was con-
"sidered as an *indemnity only*, in case of a loss: and, therefore,
"the satisfaction *ought not to exceed* the loss. This rule was cal-
"culated to prevent fraud; lest the temptation of gain, should
"occasion unfair and wilful losses.

"If the insured is to receive *but one* satisfaction, natural jus-
"tice says, that the several insurers shall all of them *contribute*
"*pro rata*, to satisfy that loss against which they have *all* insured.

"No particular cases are to be found, upon this head; or, at
"least, none have been cited by the counsel on either side.

"Where a man makes a *double* insurance for the *same* thing,
"in such a manner that he can clearly recover against several
"insurers, in distinct policies, a *double* satisfaction, the law cer-
"tainly says, 'that he *ought not* to recover doubly for the *same*
"*loss*, but be content with *one single satisfaction* for it.' And if
"the same man really, and for his own proper account, insures
"the same goods doubly, though both insurances be not made
"in his own name, but one or both of them in the *name* of *an-
"other person*, yet that is just the same thing; for the *same per-
"son* is to have the *benefit of both* policies. And if *the whole*
"should be recovered from *one*, he ought to stand in the place of
"the insured, to receive *contribution* from the other, who was
"equally liable to pay the whole." 1 *Burr.* 492.

In

1800. In the case of *Newby* v. *Reed*, at sittings after term, in 1763, 2 *Bl. Rep.* 416. the same doctrine is laid down, agreed to, and confirmed. For "it was ruled by Lord *Mansfield*, Chief Justice, and agreed to "be the course of practice, that upon a double insurance, though "the insured is not entitled to two satisfactions; yet, upon the "first action, he may recover the whole sum insured, and may "leave the defendant therein, to recover a rateable satisfaction, "from the insurers."

These cases have never been contradicted, and must be decisive on the subject. The law, as stated in the above adjudications, is recognized by *Park* and *Miller*, two recent and respectable writers on marine insurances. Such being the law of *England*, as to double insurances, before and at the commencement of our revolution, it was also the law of this country, and is so now. It is of authoritative force, and must govern the present case. Besides, if the Court were at liberty to elect a rule, I should adopt the *English* regulation, which divides the loss rateably among the insurers. It is the most convenient, equal, and consonant to natural justice, and has been practised upon, nearly half a century, by the first commercial nation in the world. I am not clear, that the practice of *France* is not in conformity with this rule; for it is probable, that they open but one policy, bearing the same date, though signed at different times, or different policies of the same date; in either of which cases, by the *French* ordinance, the insurers contribute rateably to satisfy the loss sustained by the insured. If so, it is precisely the *English* and *American* rule. Equality is equity. This maxim is particularly applicable to commercial transactions; and, therefore, the rule of contribution ought to be favoured. The pressure, instead of crushing an individual, will be sustained by several, and be light. The result is, that the defendant must contribute rateably to make up the loss of the insured.

Judgment for plaintiff.

CIRCUIT COURT,

PENNSYLVANIA DISTRICT.

May Term 1801.

Present TILGHMAN, Chief Judge.
BASSET, and GRIFFITHS, } Circuit Judges.

Hurst's Lessee *versus* Jones.

A FORMER ejectment, between the same parties, for the same land, had been *non pros'd;* but the costs of suit remained unpaid.

The defendant's counsel objected to the trial of the present ejectment, until the costs of the former were paid.

By the COURT. The objection is reasonable and just. The defendant cannot, under such circumstances, be compelled to proceed to a trial.

The cause continued.

Rawle, for the plaintiff.
E. Tilghman, for the defendant.

Hollingsworth *versus* Duane.

IN this case (which was an action for a libel) the defendant filed a plea to the jurisdiction of the Court, on the ground, that he, as well as the plaintiff, was a citizen of *Pennsylvania.* Issue being joined on that fact, it was found, by the Jury, that the defendant was not a citizen; and thereupon, in consequence of a previous agreement, a *venire* issued to ascertain the *quantum* of damages, which the verdict settled at 600 dollars. After

1801. the verdict was given, it appeared that one of the jurors was an alien; and *Dallas* obtained a rule to show cause, why the verdict should not be set aside for that reason.

On the argument, in support of the rule, it was contended, 1st. That the trial by jury, entire, was anxiously adopted by the *United States*, as well as by this state; including the right, and causes, of challenge as at common law, in civil and in criminal cases. 1 *vol. State Laws, App.* 55. *s.* 9. 11. (*Dall. edit.*) *Ibid.* 58. *s.* 25. 3 *vol.* 36. *s.* 9. 6. 4 *vol. Acts Cong. p.* 25. *art.* 8, 9. 1 *vol. State Laws, p.* 134. *s.* 4. *Dall. edit.* 2 *vol.* 802. *s.* 2. 3 *vol.* 606. *s.* 16. 2 *vol.* 264. *s.* 9. 12. 3. 1 *vol. Acts Cong.* 113. *s.* 30. *Ibid.* 68. *s.* 29. 2d. That on principle, as well as on authority, alienage was a cause of challenge to a juror before verdict. 3 *State Laws, Const. art.* 8. 1 *vol. Acts Cong. Const. art.* 6. *Ibid.* 67. *s.* 29. 1 *Roll. Abr.* 657. *Co. Litt.* 156. *b.* 3 *Bl. Com.* 362. *Gilb. P. C.* 94. 1 *Dall. Rep.* 74. 3d. That if the cause of challenge was unknown when the jury was qualified, it may be used to set aside the verdict, as for a mistrial. 3 *Dall. Rep.* 515. 11 *Mod.* 119. 2 *Wood.* 352. *An. Reg.* 1790. *p.* 46. 2 *Ld. Raym.* 1410. 1 *Stra.* 640. 1 *vol. Acts Cong.* 6. *s.* 17. 2 *Stra.* 1000. 593.

E. Tilghman and *Ingersoll*, in opposition to the rule, contended, 1st. That, in *Pennsylvania*, alienage was not a cause of challenge to a juror. But, 2d. That the objection was too late after the juror was sworn, and the verdict was given.

The COURT, after a long advisement upon the subject, seemed to think, that alienage might have been a cause of challenge, before the juror was sworn; but, upon an extensive review of the authorities, they decided, that advantage could not be taken of it, after verdict.

Rule discharged. (1)

Penn *versus* Butler. Penn *versus* Penn.
Butler *versus* Penn. Same *versus* Same.

THESE were bills in equity, involving a great variety of facts, respecting the disposition of the estates of the late proprietary family: but the principal object of all of them, was submitted for the opinion of the Court, on the following agreement:

"It is agreed, that these suits be submitted for the opinion of "the Court, upon the following statement of facts, admitted by

(1) Since the discussion of this case, the marshal has been directed not to return aliens upon the panel; and, in many instances, when aliens have been returned, the state, as well as the federal, Courts have discharged them, upon their own application.

"all

1801.

" all the parties, except the fact, that *Anthony Butler*, *for his own accommodation, and without the consent, knowledge, or approbation, of John Penn the elder*, took, *inter alia*, in part payment of certain sales herein after mentioned, certain bonds and mortgages, in the joint names of *John Penn* the elder, and *John Penn* the younger, as obligees and mortgagees; which fact, it is agreed, shall be decided by the Court, on evidence to be produced; and that such formal decrees be eventually drawn and entered in each, as will effectuate the opinion which the Court shall pronounce.

" Case. *John Penn* the elder, and *John Penn* the younger, after the act of assembly of *Pennsylvania*, passed *November* 27th 1779, entitled " an act for vesting the estates of the late proprietaries of *Pennsylvania* in this commonwealth," remained seised and possessed, as tenants in common, of all their manors, reserved tracts, &c. in *Pennsylvania*, with power to sell in fee: three-fourth parts being the property of *John Penn* the younger; and one-fourth part being the property of *John Penn* the elder. On the 19th of *November* 1787, *John Penn* the elder appointed *John F. Mifflin* his attorney, with power to sell and convey, &c. to receive payment for lands sold either in money or securities; and to substitute any agent or agents. And on the 23d of *December* 1787, *John F. Mifflin* substituted *Anthony Butler*. On the 29th day of *June* in the year 1787, *John Penn* the younger, appointed *Robert Millegan* and *John F. Mifflin* his attornies, with power to sell, and convey, &c. to receive payment for lands sold, either in money or securities; and to substitute any agent or agents. And on the 29th day of *June* in the year 1787, *Robert Millegan* and *John F. Mifflin* substituted *Anthony Butler*. *John Penn* the younger afterwards revoked the power of attorney, which he had granted to *Robert Millegan* and *John F. Mifflin*. And on the 29th of *April* 1788, *John Penn* the younger appointed the said *Anthony Butler* his attorney, with powers to sell and convey, and to receive in payment money or securities.

" By virtue of the several powers above stated, *Anthony Butler* did, at sundry times, sell several tracts of land, belonging to the said *John Penn* the elder, and *John Penn* the younger, as tenants in common, in the proportions aforesaid; and in payment therefor (*inter alia*) took, for his own accommodation, without the consent, knowledge, or approbation, of the said *John Penn* the elder, certain bonds and mortgages, in the joint names of *John Penn* the younger, and *John Penn* the elder, as obligees and mortgagees. After the time of taking the said bonds and mortgages, to wit, on the 9th of *February* 1795, *John Penn* the elder died, leaving *Anne Penn* and *John F. Mifflin* executrix and executor of his last will and testament.

" There

1801. "There are in the hands of *Anthony Butler*, a number of "bonds and mortgages, taken as aforesaid, in each and all of "which bonds and mortgages, the said *John Penn* the younger "is interested three undivided fourth parts; and the aforesaid "executors of *John Penn* the elder are interested the other one "undivided fourth part.

"Questions. 1st. Whether *John Penn* the younger, as sur-"viving obligee and mortgagee, is entitled to have and receive "from *Anthony Butler*, all the said bonds and mortgages, for the "purpose of collecting and distributing the money thereby se-"cured and made payable, according to the respective interests "of the parties?

"2d. Or, whether the executors of *John Penn* the elder, are "entitled to receive one fourth part in value of the said specific "bonds and mortgages, for their separate use and benefit?

"3d. Or, whether the Court will consider the bonds and mort-"gages, under the circumstances of the case, as several, as well "as joint, to be followed with the consequences inferable from "such principle?"

On the hearing, Mr. *Butler's* testimony stated, "that he was, at first, the separate agent of *John Penn*, the younger, when Mr. *T. Francis* was the separate agent of *John Penn*, the elder; that during this period the bonds, for purchase money of lands sold, were separately taken, according to the interests of the parties; that in *September* 1787, he became the agent of both the *Penns*, but continued, for sometime, to take separate bonds; that the purchasors complained of the expense of giving separate bonds and mortgages, and he then determined to take them for the joint use of his principals; that he received no instructions upon the subject, from either party; and that he was not, in fact, aware of any difference between taking the bonds jointly or severally." It, also, appeared, that Mr. *J. R. Coates* had been appointed the agent of *John Penn*, the younger; and the general question was, whether Mr. *Butler* should be directed to deliver up the joint bonds and mortgages to him, as the agent of the surviving obligee?

Ingersoll and *Mifflin* contended, against the claim of the surviving obligee, 1st. That it was founded merely on the mistake, and misapprehension, of the agent, acting for two parties, having distinct interests, and giving separate powers. 2d. That, under such circumstances, a Court of equity can, and ought to, apportion the securities, by a fair division of them; so that each party may possess the entire interest and remedy in his proportion. 3d. That even if an apportionment could not be made, the Court will appoint a receiver, to collect and divide the joint fund, in the regular proportions. On these points, the following books were cited: 3 *P. Wms.* 158. 21 *Vin. Abr.* 509. *pl.* 4. *Carth.* 16. 1 *Eq. Abr.*

Abr. 293. 3 *Vez. jun.* 628. 631. 399. 2 *Com. Dig.* 255. 258. 1 *Eq. Abr.* 290. *A.* 1801.

Rawle and *Dallas*, in support of the claim of the surviving obligee, urged, 1st. That the point of law is clearly in favour of of the claim; and to set aside a plain rule of law, there must be strong, controuling, principles of equity, in favour of the opposite party. 2d. That the act of taking joint securities was not a mistake, or error; but a deliberate act for the accommodation of purchasors. 3d. That there was no suggestion of a fraud, a breach of trust, wilful *laches*, or probable insolvency, in reference to the surviving obligee. 4th. That there is, therefore, no foundation for the interposition of the Court to appoint a receiver; nor to justify a Court of equity in compelling the parties to accede to an arbitrary apportionment of the securities. On these points were cited, *Yelv.* 177. *Vent.* 34. 3 *Dy.* 350. *Sheph.* 363. 356. 2 *Brownl.* 207. 1 *Eq. Abr.* 290. 2 *Pow.* 263. *Ambl.* 311. 1 *Dall. Rep.* 248. *Wallace* v. *Fitzsimons.* 2 *Com. Dig.* 110. 209. 213. 255. 2 *Vern.* 556.

The COURT were decidedly of opinion, that, at law, the surviving obligee was entitled to the possession of the joint securities, that he might recover the amount; and that there was no ground laid, on the present occasion, for the interposition of a Court of equity. (1)

(1) On this clear intimation of the opinion of the Court, Mr. *Coates* liberally declared, that if the executors of *John Penn*, the elder, would concur in giving him immediate possession of the securities, he would not charge a commission, for collecting and paying their proportion of the amount; and the proposition was, accordingly, agreed to.

CIRCUIT COURT,

PENNSYLVANIA DISTRICT.

May Term 1802.

Present TILGHMAN, Chief Judge.
BASSET, and GRIFFITHS, } Associate Judges.

The United States *versus* Conyngham *et al.*

THIS cause came before the Court, on a case stated for their opinion, in the following terms:

"At the term of *September* 1798, judgment was obtained in "the Supreme Court of *Pennsylvania*, at the suit of *John Travis* "*et al.* v. *Francis* and *John West*, for 1365*l.* 3*s.* 9*d.* debt, and "6*d.* costs.

"A *fieri facias* issued under the said judgment, returnable to "*December* term 1798, under which certain goods and chat-"tels, (1) belonging to the defendants, were levied on and taken "in execution, by the sheriff of the county of *Philadelphia*, on "the 8th day of *January* 1799.

"The 8th of *January* 1799, the said *John Travis* and others, "plaintiffs in the said action, for a full and valuable considera-"tion, to them paid by the defendants in this action, assigned "the judgment, and all the monies due thereon, to them the said "*David H. Conyngham* and *John M. Nesbitt*.

"The goods and chattels so as aforesaid levied upon, were, "with the assent and approbation of the said plaintiffs in the said "judgment before the said assignment, and by the defendants in "this action since the said assignment, and by the sheriff, with "the assent and approbation aforesaid, permitted to be and re-

(1) It was agreed on the argument to state, that the goods were, principally, household furniture.

"main

1802.

"main in the possession of the said *Francis* and *John West* until the levying of the execution hereinafter mentioned.

"At the *August* sessions 1797, of the ditrict Court of the "*United States*, for the *Pennsylvania* district, judgment was obtained, at the suit of the *United States*, against the said *Francis* and *John West*, under which judgment a writ of *fieri facias* was issued, and on the 13th day of *January* 1800, was "levied on the same goods and chattels, then being in the possession of the said *Francis* and *John West*, or one of them.

"On or about the 20th day of *April* 1801, after a time had been fixed, by the marshal of the *United States*, for the sale of "the property so levied on by him, at the suit of the *United States*, and after advertisements had been put up in the most "public places, of the city of *Philadelphia*, notifying the time and "place of such sale, the present defendants, for the first time, "gave notice of the prior execution before mentioned.

"Notice was given to the marshal, that if he proceeded on the "sale, an action would be brought against him; and it was, "therefore, agreed, that the goods should be appraised by sworn "appraisers, which was done, and the value thereof, according "to the appraisement amounting to 1557 dollars 75 cents, is "admitted to be in the hands of the defendants in this action.

"The question submitted to the Court is, whether, on the "preceding circumstances, the execution issued by *John Travis* "*et al.* can be supported against the execution subsequently issued by the *United States*.

"If the Court shall be of opinion in the affirmative, then "judgment to be given for the defendant, otherwise for the "plaintiff.

"A. J. DALLAS, for plaintiff.
"MOSES LEVY, for defendant.

"*January* 30th 1802."

The question was discussed by *Rawle* and *Dallas*, for the plaintiff, and by *Lewis* and *Levy*, for the defendant; the former relying on the authorities in the *English* books: 1 *Vez.* 245, 6. 1 *Wils.* 44. 7 *Mod.* 37. 10 *Vin. Abr.* 561. 568. *Peake. N. P.* 65. 1 *Salk.* 320. *Carth.* 420. 2 *Vern.* 238. *Ld. Raym.* 251. *Cowp.* 712. 1 *T. Rep.* 729. 1 *Esp.* 205. And the latter relying on the decisions of the Courts of *Pennsylvania*, varying the *English* rule of law, according to the peculiar circumstances of the country. See *ante*, *p.* 165. 208. 213.

The COURT, after great deliberation and research, delivered elaborate opinions, *seriatim*, upon the principles and authorities, connected with the discussion; expressed their regret at differing from the decisions of the state Courts; and, unanimously, gave judgment for the plaintiff.

Knox

1802.

Knox *et al. versus* Greenleaf.

CASE. The defendant filed the following plea in abatement:

"The said *James Greenleaf*, who is impleaded by the addition and description of a citizen of the state of *Maryland*, by "*Jared Ingersoll*, his attorney, comes and defends the force and "injury, &c. and says, that he, long before the arrest in the present "action, and at the same time, as well as twelve months preceding the said arrest, and continually afterwards, was, and yet is, a "citizen of the state of *Pennsylvania*, having his permanent domicil and residence in the said state, or district, of *Pennsylvania*, and not a citizen of the state of *Maryland*. And the "said *James Greenleaf*, by his attorney aforesaid, further saith, "that according to the constitution and laws of the *United States*, "a citizen of *Pennsylvania* cannot be impleaded or compelled "to answer, by another citizen of the same state, before the "Judges of the Circuit Court, but only in the Courts of the "state, having competent jurisdiction of the case. And this he "is ready to verify: therefore he prays judgment, if he ought "to be compelled to answer the said *William* to the said plea in "Court, &c."

The plaintiffs filed a replication, averring that the defendant was a citizen of *Maryland*; and issue being thereupon joined, the question was tried before GRIFFITHS, and BASSET, *Associate Judges*, the CHIEF JUDGE declining, on account of a family connexion with the defendant, to take a judicial part in the cause.

Upon the evidence, it appeared, that the defendant was a native of *Massachusetts*; that he came to *Philadelphia* in 1796, and purchased a valuable house in *Chesnut-street*, in which he lived, until his pecuniary embarrassments and consequent imprisonment occurred in 1798; that his clerks and servants continued afterwards to live there, until the house was sold to Mr. *Tilghman*; that being discharged by the *Pennsylvania* insolvent acts in *March* 1798, he went to the southward, and returned to *Philadelphia* before the yellow fever of 1798 had subsided; that between the 5th of *November* 1798, and the 20th of *January* 1799, he applied to the legislature of *Maryland*, styling himself of that state, for the benefit of an insolvent act, in the nature of the bankrupt laws; that, on the 10th of *January* 1799, an act was passed accordingly, in which he was described as "of *Prince George* county," and by which it was provided, that the chancellor, before granting the benefit of the act, should be satisfied, by competent testimony, that the defendant was, at the time of passing the act, "a citizen of the *United States*, and of this state;"

that

that the defendant was discharged under this act, on the 30th of *August* 1799; that he returned to *Philadelphia* in *February* 1800; that he removed from *Philadelphia* to *Northampton* county, in *June* of the same year, has paid taxes there, and has never left the state since; and that he was arrested, in the present suit, on the 20th of *February* 1801. 1802.

The principal point discussed, upon these facts, was, whether the defendant was a citizen of *Pennsylvania*, so as to exclude the jurisdiction of the federal Court, the plaintiffs being themselves citizens of that state? (1)

For the plaintiffs, it was contended, by *Moylan*, that the defendant could only be regarded as an inhabitant, not as a citizen, of *Pennsylvania*; that he had represented and proved himself to be a citizen of *Maryland*, in *August* 1799, or he could not have enjoyed the benefit of the act of that state; and that he had not, upon the most liberal calculation of time, resided in *Pennsylvania* long enough to acquire the rights of permanent citizenship, upon the principle of the constitution. 1 *vol. Acts Cong. p.* 55. *s.* 11. *Const. Penn. art.* 3. *s.* 1.

For the defendant, it was contended, by *Ingersoll* and *Dallas*, that a citizen of one state, was, constitutionally, entitled to be a citizen of every state; that the acts of congress prescribe a mode for naturalizing aliens, but none for communicating the municipal rights of citizenship, to a citizen removing from one state to another; that as to the naturalization of aliens, *Pennsylvania* leaves the subject to the acts of congress; and for the exercise and enjoyment of every right of citizenship, her constitution only stipulates, that the party shall be a citizen, shall have resided for a specified time, and shall have paid taxes; that the three requisites must be complied with, in the case of a native, as well as of an adopted, citizen, for the purposes contemplated; that, being a citizen, absence from the state does not disfranchise, except as to the right of electing and being elected, which depends on residence, as well as citizenship; that a citizen of *Massachusetts* coming into *Pennsylvania*, with a view to settle, acquiring real estate, and paying taxes, is a citizen of *Pennsylvania*, to every purpose, but that, of electing, or being elected, within the respective periods prescribed by the constitution; and that the laws of *Maryland* communicate, *instanter*, the rights of municipal citi-

(1) This action was brought against Mr. *Greenleaf*, as indorser of notes issued by *Morris* and *Nicholson*, which he had pledged as security for his own notes, given to the plaintiffs. His own notes were due before he was discharged, under the insolvent act; but the notes, of which he was indorsor, became due afterwards. This afforded matter for argument, but did not appear to enter into the decision of the Court. The plaintiff's counsel cited 4 *T. Rep.* 714.

1802. zenship, to a citizen going thither, from another state, without impairing the permanent domiciliated citizenship, to which he is entitled in his own state. *Const. art.* 4. *s.* 1. 2 *Dall. Rep.* 370. *Const. Penn. art.* 1. *s.* 3. 8. *art.* 2. *s.* 4. 8. *art.* 3. *s.* 1. *art.* 6. *s.* 1. *art.* 9. *s.* 20, 21. 4 *vol. State Laws*, 332. *s.* 1. 1 *Dall. Rep.* 152. 158. 241. *Maryland Laws, July* 1779. *ch.* 6. *Nov.* 1789. *ch.* 24. *Nov.* 1792. *ch.* 14. *Nov.* 1793. *ch.* 26.

The COURT were clearly of opinion, that the defendant was entitled to be considered as a citizen of *Pennsylvania*; and the jury found a verdict accordingly.

Verdict for the defendant.

CIRCUIT COURT,

PENNSYLVANIA DISTRICT.

April Term 1803.

Present WASHINGTON, an Associate Judge of the Supreme Court.
PETERS, District Judge.

Balfour's Lessee *versus* Meade.

THIS was an ejectment for four tracts of land, lying north and west of the *Ohio* and *Alleghany* rivers, and *Conewango* creek, in *Pennsylvania*. The plaintiff's title rested upon settlement rights, surveys, and warrants. In 1793, the plaintiff was a surgeon in the army in garrison at fort *Franklin*. He took some of the soldiers, went out, cut down a few trees, and built up five pens, or cabins, about 10 feet square, and, without putting covers on them, returned back to the fort in six or seven days. In *April* 1795, he had these five tracts surveyed in the name of himself, *Elizabeth Balfour*, and three others, each four hundred acres. The deputy surveyor had, upon application of the plaintiff, directed one *Wilson* to make the surveys, but something preventing him from doing it, the plaintiff employed one *Steel* to do it; and upon returning the surveys to *Stokely*, the deputy surveyor, he prevailed upon him to write an authority to *Steel* to make the surveys, which *Stokely* says he did, and antedated it, in order to make it appear to precede the surveys. In *May* 1795, he obtained warrants of acceptance for two of the surveys of two of the tracts, having paid the consideration money for all.

In autumn 1794, *Meade*, the defendant, finding no person settled upon these tracts, built cabins upon the four tracts in controversy, covered them, or some of them, and then went off, not returning again until *November* 1795, when he came, with his family, to reside in one of the cabins, and fixed settlers upon the other tracts. In *July* 1795, the plaintiff gave notice to the defendant,

1803. fendant, that he claimed the tracts in question, that he intended to settle them, and forewarned him to proceed no further with his improvements thereon.

In *January* 1796, the defendant *caveated* the plaintiff in form, and the same being tried before the board of property in *March* 1800, the *caveats* were dismissed, and warrants were ordered to issue, but they never did issue, in consequence of doubts afterwards existing respecting the plaintiff's title.

In *April* 1796, the plaintiff made engagements with some persons to settle these lands for him; but, after they had seen and approved the lands, they declined going on them on hearing of the defendant's claim.

It was in proof, by many witnesses, that the war with the *Indians* rendered it dangerous to settle that country, during the years 1793, 1794, and 1795, and that but few attempted before the spring or autumn of 1796.

E. Tilghman and *Dallas* contended, that the plaintiff had acquired a good right by settlement, survey, and warrant, to the lands in question, under the laws of *Pennsylvania*, and particularly the act of the 3d of *April* 1792, 3 *vol. p.* 209.; that the settlement of *Meade*, in 1795, was in violation of the plaintiff's prior right, and, of course, void; that the plaintiff had been prevented, by the *Indian* hostilities, from settling, or fixing settlers, until the treaty of fort *Grenville*, made in *August* 1795, and ratified in *December* 1795; and that he had attempted to settle it in a reasonable time after that event. 1 *Dall.* 6. 2 *Dall.* 98. 3 *Dall.* 457. *Addison*, 216. 354. 218.

Ingersoll and *M'Kean* contended, that the plaintiff never had made a settlement within the meaning of the law, not having accompanied it with actual residence, or an intention to reside; that of course, he never had an inceptive title to be protected by the proviso in the 9th section of the act of the 3d of *April* 1792. They cited *Addison*, 248. 335. The case of the *Holland* company v. *Coxe*, in the Supreme Court of this state (*ante*, *p.* 170.) and the decisions of the judges of that Court, in a feigned issue, tried at *Sunbury*, *ante*, *p.* 237.

WASHINGTON, *Justice*. The importance of this cause, led the Court to wink at some irregularities in the argument at the bar, which have tended to protract it to an unreasonable length. Depending on the construction of laws of the state, and particularly on that of the 3d of *April* 1792, it had, at first, the appearance of a difficult, and very complicated, case. It is not easy at the first reading of a long statute, to discover the bearings of one section upon another, so as to obtain a distinct view of the meaning, and intention, of the legislature. But the opinion I now entertain, was formed on *Saturday*, before we parted; open, however,

ever, as it always is, to such alterations as ulterior reason and argument may produce. 1803.

The better to explain, and to understand, the subject, it will be necessary to take a general view of the different sections of the act of the 3d of *April* 1792, upon which this cause must turn. The 1st section reduces the price of all vacant land, not previously settled, or improved, within the limits of the *Indian* purchase, made in 1768, and all precedent purchases, to 50*s.* for every 100 acres; that of the vacant lands within the *Indian* purchase made in 1784, lying east of *Alleghany* river and *Conewango* creek, to 5*l.*, to be granted to purchasers, in the manner authorised by former laws. The 2d section offers for sale all the other lands of the state, lying north and west of the *Ohio*, *Alleghany*, and *Conewango*, to persons who will *cultivate*, *improve*, *and settle* the same, or cause it to be done, at the price of 7*l.* 10*s.* per hundred acres, to be located, surveyed, and secured, as directed by this law. It is to be remarked, that all the above lands lie in different districts, and are offered at different prices. Title to any of them may be acquired by *settlement*, and to all, except those lying north and west of the *Ohio*, *Alleghany*, and *Conewango*, by *warrant without* settlement.

The 3d section, referring to all the above lands, authorises applications to the secretary of the land office, by any person having settled and improved, or who was desirous to settle and improve, a plantation *to be particularly described;* for a warrant for any quantity of land, not exceeding 400 acres, which warrant is to authorise and require the surveyor general to cause the same to be surveyed, *and to make return of it*, the grantee paying the purchase money and fees of office. The 8th section, which I notice in this place because intimately connected with the third section, directs the deputy surveyor to survey and mark the lines of the tract, upon the application of the *settler*. This survey, I conceive, has no other validity than to furnish the *particular description*, which must accompany the application at the land office for a warrant.

The 4th section, amongst other regulations, protects the title of an *actual settler*, against a warrant entered with the deputy surveyor, posterior to such actual settlement.

The 9th section, referring *exclusively* to the lands north and west of the *Ohio*, *Alleghany*, and *Conewango*, declares, "that no "warrant or survey of lands within that district, shall give a ti- "tle, unless the grantee has, prior to the date of the warrant, "made, or caused, to be made, or shall, within two years after "the date of it, make, or cause to be made, an actual settlement, "by clearing, fencing, and cultivating two acres at least in each "hundred acres, erecting thereon a house for the habitation of "man, and residing, or causing a family to reside thereon for "five years *next* following his first settling the same, if he shall

"so

1803. "so long live, and in default of such actual settlement and resi-
"dence, other actual settlers may acquire title thereto."

Let us now consider this case, as if the law had stopped here. A title to the land in controversy, lying north and west of the *Ohio*, *Alleghany*, and *Conewango*, could be acquired in no other manner, than by *actual settlement;* no sum of money could entitle a person to a warrant, unless the application was preceded by actual settlement on the land, or, if not so preceded by actual settlement, the warrant would give no title, unless it were followed by such settlement within two years thereafter.

The question then is, what constitutes such an actual settler, within the meaning and intention of this law, as will vest in him an inceptive title so as to authorise the granting to him a warrant; not a *pedis possessio* not the erection of a cabin, the clearing, or even the cultivation, of a field. These acts may deserve the name of *improvements*, but not *settlements*. There must be an occupancy, accompanied with a *bonâ fide* intention to reside and live upon the land, either in person, or by that of his tenant, to make it the place of his habitation, not at some distant day, but at the time, he is improving: for, if this intention be only future, either as to his own personal residence or that of a tenant, then the execution of that intention, by such actual residence, fixes the date; the commencement of the settlement, and the previous improvements, will stand for nothing in the calculation.

The erection of a house, and the clearing and cultivating the ground, all or either of them may afford evidence of the *quo animo* with which it was done; of the intention to settle; but neither, nor all will, constitute a settlement, if unaccompanied by residence. Suppose, then, improvements made, the person making them declaring at the time, that they were intended for temporary purposes of convenience, and not with a view to settle and reside; could this be called an actual settlement, within the meaning and intention of the legislature? Surely no: But though such acts, against express declarations of the *quo animo*, will not make a settlement, it does not follow that the converse of the proposition will; for, a declaration of an intention to settle, without actually carrying that intention into execution, will not constitute an actual settlement.

How do these principles apply to the case of the plaintiff? In 1793, he leaves the fort at which he was stationed, and in which he was an officer, with a few soldiers; cuts down some trees, erects four or five *pens* (for, not being covered, they do not deserve the name of cabins) and in five, six, or seven days, having accomplished this work, he returns into the fort, to his former place of residence. Why did he retreat so precipitately? We hear of no danger existing at the time of completing these labours, which did not exist during the time he was engaged in them. What prevented him from proceeding to cover the cabins

and

and from inhabiting them? Except the state of general hostility, which existed in that part of the country, there is no evidence of a particular necessity for flight, in the instance of this plaintiff. It is most obvious, that the object of his visit to this wilderness was to erect what he considered to be improvements; but they were, in fact, uninhabitable by a human being, and, consequently, could not have been intended for a present settlement. He was, besides, an officer in the army, and, whilst in that service, he could not settle and reside at his cabin, although the country had been in a state of perfect tranquillity. In short, his whole conduct, both at that time and afterwards; his own statements when asserting a title to the lands, the recitals in his warrants of acceptance, and certificates of survey, all afford proof which is irresistable, that he did not mean, in 1793, to settle. Mistaking the law, as it seems many others have done in this respect, he supposed that an improvement was equivalent to a settlement, for vesting a right in those lands. It is not pretended even now, nor is it proved by a single witness, not even by *Crouse*, who assisted in making the improvements, that he contemplated a settlement. It has been asked, could the legislature have meant to require persons to sit down, for a moment, on land encompassed by dangers from a savage enemy? I answer, no: at such a time it was very improbable that men would be found rash enough to make settlements. But yet no title could be acquired without such a settlement, and if men were found hardy enough to brave the dangers of a savage wilderness, they might be called imprudent men, but they would, also, deserve the promised reward, not for their boldness, but for their settlement. 1803.

The first evidence we have of an intention in the plaintiff to make an actual settlement, was in the spring of 1796, long after the actual *bonâ fide* settlement of the defendant with his family; for, I give no credit to the notice from the plaintiff to the defendant in *July* 1795, since so far from accompanying it with actual settlement, he speaks of a future settlement, which, however, was never carried into execution. Every thing which I have said with respect to the 400 acres surveyed in the name of *George Balfour*, will apply *a fortiori* against the three other surveys in the name of *Elizabeth Balfour*, &c. wh[illegible] it is not pretended were ever privy even to the making of the cabins, or ever contemplated a settlement upon those lands.

If the law, then, had stopped at the proviso, it is clear that the plaintiff never made such a settlement as would entitle him to a warrant. But he excuses himself from having made *such a settlement*, as the law required, by urging the danger to which any person, attempting a residence in that country, would have been exposed. He relies on the proviso to the 9th section of the law, which declares, " That if any such actual settler, *or* any grantee " in any such original or succeeding warrant, shall, by force of " arms

1803. "arms of the enemies of the *United States*, be prevented from "making such actual settlement, or be driven therefrom, and "shall persist in his endeavours to make such actual settlement "as aforesaid, then, in either case, he and his heirs shall be en- "titled to have, and to hold, the said lands, in the same manner "as if each actual settlement had been made and continued." Evidence has been given of the hostile state of that country, during the years 1793, 1794, 1795, and the danger to which settlers would have been exposed. We know that the treaty at fort *Grenville* was signed on the 3d of *August* 1795, and ratified the 22d of *December* in the same year. Although *Meade* settled with his family in *November* 1795, it is not conclusive proof that there was no danger even then; and, at any rate, it would require some little time, and preparation, for those who had been driven off, to return to their settlements; and if the cause turned upon the question, whether the plaintiff had persevered in his exertions to return and make such settlement, as the law requires, I should leave that question to the jury, upon the evidence they have heard. But the plaintiff, to entitle himself to the benefit of the proviso, should have had an incipient title at some time or other, and this could only have been created by actual settlement, preceding the necessity, which obliges him to seek the benefit of the proviso, or by warrant.

I do not mean to say, that he must have had such an actual settlement, as this section requires to give a perfect title; for, if he had built a cabin, and commenced his improvement in such manner, as to afford evidence of a *bonâ fide* intention to reside, and had been forced off by the enemy, at any stage of his labours, persevering, at all proper times afterwards, in endeavours to return, when he might safely do so, he would have been saved by the proviso. But it is incumbent on the plaintiff, if he would excuse himself from the performance of what has been correctly called a condition precedent, to bring himself fully and fairly within the proviso, which was made for his benefit: this he has not done.

Decisions in the Supreme Court, and in the Common Pleas, of this state, have been cited at the bar, two of which I shall notice for the purpose of pointing out the peculiar mark, which distinguishes them from the present, and to prevent any conclusions from being drawn from what has been said, either to countenance, or impeach, those decisions. The cases I allude to are, the *Holland* company v. *Coxe*, and the feigned issue tried at *Sunbury*.

The incipient title, under which the plaintiffs claimed in those causes, were *warrants*, authorised by the 3d section of the law. The incipient title in the present case, is *settlement*. The former was to be completed by settlement, survey, and patent. This was to precede the warrant; and for the more distinct explanation of this distinction,

distinction, it will be important to ascertain what acts will constitute an actual settler to whom a warrant may issue, and what constitute an actual settlement as the foundation of a title. I have before explained, who may be an actual settler to demand a warrant, namely, one who has gone upon and occupied land, with a *bonâ fide* intention of an actual present residence, although he should have been compelled to abandon his settlement, by the public enemies, in the first stages of his settlement: but actual settlement, intended by the 9th section, consists in clearing, fencing, and cultivating, two acres of ground at least, on each one hundred acres, erecting a house thereon, fit for the habitation of man, and a residence continued for five years next following his first settling, if he shall so long live. This kind of settlement more properly deserves the name of *improvements*, as the different acts to be performed clearly import. This will satisfactorily explain what at first appeared to be an absurdity in that part of the proviso, which declares, that "if such *actual settler* shall be "prevented from making such *actual settlement*, &c." The plain meaning is, that if a person has once occupied land, with an intention of residing, although he has neither cleared or fenced any land, and is forced off by the enemies of the *United States*, before he could make the improvements, and continue thereon for five years; having once had an incipient title, he shall be excused by the necessity, which prevented his doing what the law required, and in the manner required; or, if the warrant holder, who, likewise, has *an incipient title*, although he never put his foot upon the land, shall be prevented by the same cause, from making these improvements, &c. he, too, shall be *excused*, if, as is required, also, of the settler, he has persevered in his endeavours to make those improvements, &c. 1803.

But what it becomes such a grantee to do, before he can claim a patent, or even a good title, is quite another question, upon which I give no opinion.

As to the plaintiff's surveys and warrants, they cannot give him a title. Not the surveys. 1st. Because they are a mere description of the land, which the surveyor is authorised by the 8th section to make, and the applicant for the warrant is directed, by the 3d section, to lodge in the land office at the time he applies for the warrant. It is merely a demarcation, a special location of the land intended to be appropriated, and gives notice of the bounds thereof, that others may be able to make adjoining locations, without danger of interference: that is not such a survey as is returnable, so as to lay the foundation of a patent. 2d. It is not authorised by a warrant. 3d. It was not for an actual settler. 4th. It was not made by an authorised surveyor, if you believe, upon the evidence, that the authority to *Steel*, was antedated, and given after the survey was returned. Not the warrants. 1st. Because it was not a warrant of title, but of acceptance.

1803. 2d. It is not founded on *settlement*, but *improvement*, and if it had recited the consideration to be actual settlement, the recital would have been false in fact, and could have produced no legal valid consequence.

As to the *caveat;* the effect of it was to close the doors of the land office against the further progress of the plaintiff in perfecting his title. The dismission of it again opened the door, but still, the question as to title is open for examination in ejectment, if brought within six months, and the patent will issue to the successful party.

The plaintiff, therefore, having failed to show a title sufficient to enable him to recover in this action, it is unnecessary to say any thing about the defendant's title; and your verdict ought to be for the defendant.

The jury found for the defendant.

Humphries *versus* Blight's Assignees.

THIS was an amicable action, to obtain a decision upon these general facts: *Murgatroyd*, being possessed of two notes, drawn by *Peter Blight*, payable without defalcation, and being indebted to *Humphries*, offered to give the notes in part payment, and cash for the rest, of the debt. The notes had been due for some time; and a commission of bankruptcy had previously issued against *Blight*; but *Blight*, upon an application from *Humphries*, advised him to accept the proposition, without any intimation of a defence, or set-off. The notes were, accordingly, indorsed by *Murgatroyd* to *Humphries*; but when presented by the indorsee to be proved, under the commission, the assignees of *Blight* claimed a right to set-off a debt, due from *Murgatroyd* to *Blight*; and for the trial of this claim, the present action was instituted. Two questions, however, were discussed on the trial: 1st. Whether the holder of a promissory note, purchased after a commission of bankruptcy had issued against the drawer, could prove the debt, under the commission? 2d. Whether the note, being purchased after it was due, had not lost its general negotiable character; and, consequently, remained subject to any set-off, that would apply between the drawer and payee?

Hare and *Dallas* argued for the plaintiff, and cited *5 vol. Acts Cong. p.* 68. *s.* 34. *5 Geo.* 2. *c.* 30. *s.* 7. *s.* 28. *5 vol. Acts Cong. p.* 45. 74. *s.* 1. *s.* 42. 1 *Atk.* 73. 2 *Wils.* 135. *Cull.* 99. *Evans*, 220. *Co. B. L.* 19. 1 *Atk.* 119. 4 *vol. Penn. Laws*, 102, 3. *Dall. edit.* 3 *T. Rep.* 80. 7 *T. Rep.* 429. 2 *Dall. Rep.* 396. 2 *Fonbl.* 150. *Anstr.* 427.

Rawle

Rawle argued for the defendants, and cited 4 *T. Rep.* 714. 6 *T. Rep.* 57. 2 *Stra.* 1234. 3 *T. Rep.* 80. *Co.* 96. 5 *vol. Acts Cong. p.* 74. *s.* 42. 1803.

By the COURT: 1st. We have no doubt upon the right of the assignee of the note in this case, to prove the debt under the commission, and to receive a dividend. The certificate of the bankrupt, would be a bar to a recovery, in an action by the present holder of the note against him; and wherever a certificate will be a bar, the right to prove the debt, under the commission, must be unquestionable.

2d. In the case of negotiable paper, or in the case of an assignable bond, we have always thought, that the assignee takes it discharged of all the equity (as between the original parties) of which he had no notice. But whenever the assignee has notice of such equity, either positively, or constructively, he takes the assignment at his peril. The assignment, in this case, was taken after the commission of bankruptcy had issued; and the commission was legal notice, that wherever mutual debts subsisted, between the bankrupt and his creditors, the right of set-off attached. The set-off claimed by the assignees must, therefore, be allowed: and this opinion is given, without admitting any distinction, whether the notes were due, or not, before the assignment; but merely upon the ground, that the assignment was subsequent to the commission.

CIRCUIT COURT,

PENNSYLVANIA DISTRICT.

April Term 1804.

Present WASHINGTON, an Associate Judge of the Supreme Court.
PETERS, District Judge.

The United States *versus* Thomas Passmore.

THE defendant, who had become bankrupt, was prosecuted by indictment, containing two counts, for perjury, in swearing before the commissioners, on the 20th day of *September* 1803, that he "could not tell exactly the time, but believed it was the "latter [end] of 1799, that he first owned the brig *Abigail*. He "ceased to own her, he rather thought, in the year 1800," when in truth and in fact he never did own her, but had covered the property for an alien under his name. He had before sworn, at the custom-house (on the 31st of *July* 1799) that he "was the "true and only owner of the brig *Abigail*; that there was no "subject, nor citizen, of any foreign prince, or state, directly or "indirectly, by way of trust, confidence, or otherwise, interested "therein, or in the profits or issues thereof:" but no information, tending to falsify this oath, was received, until a prosecution was barred by the act of limitation. 1 *vol. Acts Cong. p.* 113. *s.* 32. (1) On the 19th of *December* 1803 (7 *vol.* 14) an act of congress was passed, enacting, "that the act of congress, passed "on the 4th day of *April* 1800, entitled 'an act to establish an "uniform system of bankruptcy, throughout the *United States*,' "shall be and the same is hereby repealed. *Provided nevertheless*, That the repeal of the said act shall in no wise affect the

(1) In consequence of this, and other similar cases, occurring at the custom house, the time allowed for prosecuting offences under the revenue laws, was enlarged. 7 *vol.* 126.

"execution

"execution of any commission of bankruptcy, which may have 1804.
"been issued prior to the passing of this act, but every such
"commission shall be proceeded on, and fully executed, as
"though this act had not passed."

The facts being laid before the jury, *Rawle* and *Dickerson*, made a defence, principally, upon two grounds: 1st. That the defendant was not guilty, upon the merits. 2d. That the oath, charged to be false, was taken before the repeal of the bankrupt law; and, in consequence of the repeal, could not be the subject of a prosecution, either under the bankrupt law, under the general penal law, or at common law. (2) On the *first* ground, they cited 4 *Bl. C.* 136. 1 *Bl. C.* 60. 1 *Hawk.* 331. 2 *Hawk.* 84. *Cro. C.* 852. *Cro. E.* 148. 1 *Salk.* 374. *Bank. Law*, *s.* 18. 2 *Esp. Rep.* 281. 1 *M'Nall. L. of E.* 3. 1 *Ld. Raym.* 396. 1 *Hale*, 706. 2 *Salk.* 513. 10 *Mod.* 335. *Cro. J.* 644. 3 *Mod.* 78. 2 *Ld. Raym.* 991. 1 *Burr.* 543. 4 *Burr.* 2026. *Cowp.* 297. *Leach C. L.* 252. 268. *Bank. Law*, *s.* 15. 21. 51. 4 *vol. Acts Cong.* 427. *s.* 88. 3 *vol.* 337. 2 *vol.* 30. 2 *vol.* 21. 4 *vol.* 102. *s.* 2. 2 *vol.* 157. 193. And on the *second* ground, they cited 1 *W. Black. Rep.* 451. 1 *Hale*, 291. 525. 1 *Hawk.* 306. 4 *vol. Acts Cong.* 528. 202.

Dallas (the district attorney) submitted to the Court three propositions: 1st. That, notwithstanding the repealing act, the perjury charged was indictable, according to the first count of the indictment, under the bankrupt law, as a incident to the execution of the commission. 5 *vol.* 61. *s.* 21. 6 *Bac. Abr.* 384. 390. 2 *Leach*, 810. *Co. B. L.* 7. 5 *Geo.* 2. *c.* 30. *s.* 44. 6 *vol.* 95. *s.* 14. 5 *vol.* 238. 6 *vol.* 93. 1 *vol.* 113. *s.* 32. 2 *Hawk.* 87. *c.* 69. *s.* 4. 6 *vol.* 80. *s.* 5. 3 *vol.* 163. 6 *vol.* 58. *s.* 1. 1 *vol.* 537. *s.* 46. 3 *vol.* 97. 3 *vol.* 334. 5 *vol.* 126. 4 *vol.* 456. 3 *vol.* 88. 1 *vol.* 236. 4 *vol.* 446. *s.* 112. *Ibid.* 427. 1 *Hawk.* 306. *Bro. Abr.* 203. 1 *Hale*, 291. 525. 2 *Hale*, 190. 2d. That the perjury charged, was indictable, according to the second count of the indictment, independent of the bankrupt law, upon the general penal act (1 *vol.* 108.) inasmuch as the provisions of the bankrupt law, do not create the offence; are affirmative and not repugnant; and, with respect to the punishment, are cumulative. *Cowp.* 297. 2 *Hale*, 705. 4 *Burr.* 2026. 23 *Geo.* 2.

(2) Before the jury were sworn, *Rawle* said, that, although he did not mean to move to quash the indictment, he should propose, under the sanction of the Court, that the question of law, arising upon the repealing act, should be discussed, as soon as the jury were sworn, and before any evidence was produced. The attorney of the district objected to the novelty of such a proceeding. And by the COURT: The trial must proceed, in the usual course. The evidence and law must both be laid before the jury, who will then give a verdict, under the charge of the Court. If the verdict should be against the defendant, his counsel may move the point of law in arrest of judgment.

1804. c. 13. *Leach*, 253. 1 *Hawk.* 306. *B.* 1. *c.* 40. *s.* 5. *Leach*, 715. 2 *Hale*, 191, 2. And, 3d. That according to the opinions of some of the judges of the Supreme Court, (3) the perjury charged, was indictable at common law; and, in that case, the conclusion of the indictment, "against the form of the statute," was to be regarded as surplusage. 2 *Hawk.* 83. *United States* v. *Ravara*, 2 *Dall. Rep.* 297. *William's case*, 2 *Cranch.* 82. *in note. United States* v. *Worrel.* 2 *Dall. Rep.* 384.

WASHINGTON, *Justice*, delivered the charge of the Court at large, upon the points of law; but cautiously abstained from giving any opinion upon the facts. He considered the repealing act, as an absolute bar to the prosecution; and told the jury, expressly, that the defendant was, on that ground alone, independent of any question upon the merits, entitled to an acquittal.

On this charge, the jury immediately found a verdict of not guilty.

Willing *et al.* Plaintiffs in Error *versus* The United States.

ERROR from the District Court of *Pennsylvania*. Upon the record it appeared, that this was an action upon a bond, dated the 16th of *November* 1802, given by *Willings* and *Francis* and *J. Miller*, in the penal sum of 15,442 dollars, to secure the payment of 7720 $\frac{41}{100}$ dollars, being the amount of one half of the duties payable on the cargo of the ship *Missouri*, on the 16th of *May* 1803. The defendants *pleaded*, 1st. That the duties on the goods in question amounted only to 14,036 $\frac{73}{100}$ dollars, on account of one half of which (7018 $\frac{36}{100}$ dollars) the bond was given. And, 2d. Payment. The plaintiff *replied*, 1st. That the ship was an *American* registered vessel, owned by the defendants, when she sailed from *Philadelphia* for *Canton*, on the 1st of *December* 1800; that after her departure she was in part sold to *Jacob G. Koch* and others, on the 12th of *February* 1801; that on making the sale the ship was not registered anew, nor was there any bill of sale executed reciting her register; that the goods were imported into the port of *Philadelphia* subsequent to the sale, on the 16th of *November* 1802; that the amount of the duties was 15,440 $\frac{32}{100}$ dollars, for one half of which, payable in six months, the bond was given. 2d. Non solverunt.

The defendants *rejoined*, That they admit the sale to *Koch* and others, and the importation of the goods after such sale; but they

(3) The attorney of the district stated, that the last point was made, in deference to the opinion of the Court, on the question of a common law federal jurisdiction, in criminal cases; and not as expressive of his own sentiments upon the subject.

aver,

aver, that the ship was at sea at the time of the sale, having her register on board, and that it was not, therefore, in the power of the defendants to deliver it up at the time of the sale; that on her arrival, the 15th of *November*, the defendants did execute a bill of sale to *Koch* and others, reciting the register, and the captain delivered up the register to the collector, whereupon the ship was registered anew, as the joint property of the defendants and *Koch* and others; that, on the 7th of *January* 1803, *Koch* and others re-sold to the defendants, and executed a bill of sale reciting the register, last mentioned; and that thereupon the ship was registered anew as the property of the defendants, whereby she continued an *American* registered vessel, not liable to foreign duties, and that the domestic duties only amounted to 14,036 $\frac{73}{100}$ dollars, &c. 1804.

The plaintiffs *sur-rejoined*, That they admit the ship was at sea when she was in part sold to *Koch* and others; but aver, that she was not registered anew, nor was there a bill of sale, reciting the register, at the time of the sale, nor at the time of her arrival. That they, also, admit that the captain delivered to the collector, the register of the ship at the time of his arrival; but they insist that it was long after she had been in part sold, without being registered anew, &c.; that the registry of the ship, on the 22d of *December* 1802, in the name of *Koch* and others and the defendants, was made after the re-sale by *Koch* and others to the defendants, when *Koch* and others had ceased to own any part; and that they admit that *Koch* and others, having previously re-sold, did, on the 24th of *January* 1803, deliver up the register in their names, and the ship was then registered anew, as the exclusive property of the defendants. But they insist, that at the time of the actual re-sale by *Koch* and others (15th *November* 1801) she was not registered anew, nor did they then execute a bill of sale reciting the register; that the registry of the 24th of *January* 1803, was made, under colour of a bill of sale executed by *Koch* and others to the defendants, long after the re-sale, and they had ceased to have any interest in the ship; and that at the time of the sale in part to *Koch* and others, of the re-sale by them to the defendants, of the arrival of the ship in the port of *Philadelphia*, and of her entry, she had ceased to be deemed a ship of the *United States*. The defendants demurred, generally, to the sur-rejoinder; and the plaintiffs joined in demurrer.

The general question, upon the demurrer, was, whether a registered vessel of the *United States*, being sold, in part, to resident citizens of the *United States*, while she was at sea, without a bill of sale reciting the register, and without being then registered anew, was liable, with her cargo, to the payment of foreign, or only to the payment of domestic, tonnage and duties, on her return to a port of the *United States*? And the argument rested chiefly upon the terms and meaning of the

1804. the 14th section of the registering act, which is in these words: "*And be it further enacted*, That when any ship or vessel, which "shall have been registered, pursuant to this act, or the act "hereby, in part, repealed, shall, in whole, or in part, be sold, "or transferred to a citizen or citizens of the *United States*, or "shall be altered in form, or burthen, by being lengthened, or "built upon, or from one denomination to another, by the mode "or method of rigging or fitting, in every such case the said "ship or vessel shall be registered anew, by her former name, "according to the directions herein before contained, (otherwise "she shall cease to be deemed a ship or vessel of the *United* "*States*) and her former certificate of registry shall be delivered "up to the collector to whom application for such new registry "shall be made, at the time, that the same shall be made, to be "by him transmitted to the register of the treasury, who shall "cause the same to be cancelled. And in every such case of "sale or transfer, there shall be some instrument of writing, in "the nature of a bill of sale, which shall recite, at length, the "said certificate, otherwise the said ship or vessel shall be inca-"pable of being so registered anew. And in every case, in which "a ship or vessel is hereby required to be registered anew, if "she shall not be so registered anew, she shall not be entitled to "any of the privileges or benefits of a ship or vessel of the *United* "*States*. And further, if her said former certificate of registry "shall not be delivered up, as aforesaid, except where the same "may have been destroyed, lost, or unintentionally mislaid, and "an oath or affirmation thereof shall have been made, as afore-"said, the owner or owners of such ship or vessel shall forfeit "and pay the sum of five hundred dollars, to be recovered, with "costs of suit."

In the District Court, judgment was rendered for the *United States*. (1)

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(1) Before the decision of the District Court, on the principal question, a preliminary point, of some importance, was determined. By the 65th section of the impost law, (4 *vol.* 386, 7.) it is provided, that "where suit shall be "instituted on any bond for the recovery of duties due to the United States, "it shall be the duty of the Court, where the same shall be pending, to grant "judgment at the return term, upon motion, unless the defendant shall, in "open Court, the United States' attorney being present, make oath, or affir-"mation, that an error has been committed in the liquidation of the duties "demanded upon such bond, specifying the errors alleged to have been com-"mitted, and that the same have been notified in writing to the collector of "the district, prior to the commencement of the return term aforesaid. Where-"upon, if the Court be satisfied, that a continuance until the next succeeding "term, is necessary for the attainment of justice, and not otherwise, a conti-"nuance may be granted, until next succeeding term, and no longer."

In order to obtain a continuance of the cause, at the return term, the defendants filed the following affidavit: "*Thomas W. Francis*, one of the above "defendants, being duly sworn, deposeth, that an error has been committed "in the liquidation of the duties demanded on the above bond, for which this "suit

The cause was again argued in the Circuit Court, on the 6th and 7th of *May* 1804, by *Dallas* (district attorney) for the *United States*, and by *Rawle* and *Lewis*, for the plaintiffs in error. 1804.

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"suit is brought, inasmuch as the sum of seven thousand seven hundred, and "twenty dollars and forty-one cents is thereby demanded for duties on goods, "per the ship *Missouri*, whereas the sum of seven thousand and eighteen "dollars and seventy-three cents only was due for the same, the said ship, "the *Missouri*, being a registered ship, belonging to citizens of the *United* "*States*, and not a foreign, or unregistered ship, or liable to foreign duties. "And the said *Thomas W. Francis* further deposes, that the above errors have "been notified in writing to the collector of the district of *Philadelphia*, before "the commencement of this present term, being the return term to which the "above action was brought, and that this deponent did, in behalf of himself "and the other obligors in the said bond, on the sixteenth day of *May* last, "tender to the cashier of the bank of the *United States*, where the said bond "was deposited for collection, the last-mentioned sum of money (seven thou-"sand and eighteen dollars, and seventy-three cents) being as this deponent "verily believes the whole amount thereon due: that the said cashier of the "bank refusing to receive the same, this deponent, in behalf of the aforesaid, "tendered the same sum of money to the collector of the district of *Philadel-*"*phia*, on the seventeenth day of the same month, being as soon as he could "ascertain by inquiry that the said bond had been returned from the bank of "the *United States* to the collector. That the said collector also refused to "receive the same; that this deponent afterwards, to wit, on the 7th of *July* "last, did pay to the attorney of the district of *Pennsylvania* the said sum of "7018 dollars, 73 cents, say seven thousand and eighteen dollars and seventy-"three cents, on the terms and conditions expressed in a receipt whereof a "copy is hereunto annexed."

Dallas (the district attorney) insisted, that the cause assigned for a postponement of trial, in the affidavit, was not an error in the liquidation of the duties; for, the manifest policy and intent of the law, were to enforce a payment of the revenue, against every plea, or pretext, except a plain error in fact; and, here, no error in the calculation of figures, no accidental error in the rate of duties, was assigned; but a defence was suggested, upon a principle, which would equally apply to a charge of foreign duties, made in consequence of any other description of forfeiture, and disability, under the acts of congress; though the secretary of the treasury was vested with a special power of remission and mitigation in such cases.

After argument, however, (*Rawle* and *Lewis* being for the defendants) the District Judge decided, that the cause assigned for a postponement, was within the terms and meaning of the act of congress.

The opinion of the Court, on the principal question, was afterwards delivered in the following terms:

PETERS, *District Judge*. This is a suit commenced on a custom-house bond, for one half the duties due to the *United States*, by the defendants *Willings and Francis* on goods imported in the ship *Missouri* from *Canton*. The bond is in the usual form, dated the 15th of *November* 1802; and was given with other bonds for duties, as charged at the custom-house, amounting to 15,440 dollars 82 cents; being the sum chargeable on goods imported in a ship belonging to a foreigner. For the facts I refer to the pleadings on file. The real point in dispute is, "Whether the goods imported in the ship *Missouri* are "liable to foreign or domestic duties?" There is no doubt, and by the joinder in demurrer it is allowed, that the ship, when the goods were laden and ever since, did belong to citizens of the *United States*. And if they had been the same citizens to whom the ship belonged at the time of her clearing out at the *American* custom-house, before her departure for *Canton*, only the domestic duties could have been charged. These would have amounted to 14,036 dollars,

1804. *For the United States.* The general question is, whether the cargo of the ship *Missouri* was liable to the payment of foreign duties, on the 15th of *November* 1802, when she returned to the port

lars, 73 cents, causing a difference in favour of the defendants, *Willings* and *Francis*, of 1404 dollars 9 cents. This sum only is in dispute, at this time, though, it is said, the defendants are affected by the point in controversy, to a considerable amount. But the difficulty is created by a transfer having been made by *Willings* and *Francis* the original owners to *Jacob Gerard Koch*, and others, also citizens of the *United States*, of a part of the ship *Missouri* while at sea and on her voyage. No bill of sale reciting the register of the ship was made till after her arrival at the port of *Philadelphia*. A parol sale was made, which, though legal, *bonâ fide*, and effectual, as between the parties, was not so conformable to the law of the *United States*, as to entitle the vendees to have their names inserted in a new register. Finally (after the sale by parol before mentioned and a resale to the original owners) a bill of sale was given agreeably to law, and the vessel obtained a new register, though the duties remained as at first charged at the custom house. *T. W. Francis* at the time of the entry disclosed all the circumstances, and the whole proceedings are *bonâ fide* and without fraud, or any improper intention. The amount having been *liquidated* at the custom house as for foreign duties, and the bond before mentioned, among others, given for their amount, a suit was commenced in this court thereon. At the return of the writ, the attorney of the district moved for judgment agreeably to the act of congress. The defendants filed an affidavit in legal form requesting, a trial or a continuance, because they alleged there had been an error in the liquidation of the account at the custom house, owing to foreign, instead of domestic, duties having been charged. On mature consideration, and after diligent and careful examination into the technical meaning of the word "*liquidation*," as explained by the best authorities, both legal and philological, I was of opinion that the Court was bound to comply with the defendants request. The authority of the Court to give an opportunity for legal investigation, is grounded on the true meaning of this word *liquidation*, which comprehends the *principles*, as well as *arrangements*, of accounts.

The cause has been ably argued on both sides. The whole controversy turns on the 14th section of the act entitled "an act concerning the registering and "recording of ships and vessels," passed the 31st of *December* 1792. A very extensive range has been taken by the counsel on both sides of the question. The principles, intent, and policy, of the act, have been investigated with much ability and talent. I do not hesitate to say, that to me this question, on the words of the section, is difficult, though one of the counsel for the defendants seems to consider the case as perfectly clear. I do not give an opinion upon it with confidence, though my duty requires it, and I must decide. Were I in a situation to say what the law *ought, in this case, to have been*, I should have a clear conviction and would, accordingly, decide in favour of the defendants. I should be warranted in this opinion by the law as *it now is*. The knotty part of the question, is that affected by the time *when*, in the 14th section. "*When* any ship or vessel, which shall have been registered pursuant to "this act, or the act hereby, in part repealed, shall, in whole, or in part, be "sold or transferred to a citizen or citizens of the *United States*, or shall be "altered in form, &c."

On the part of the defendants it is insisted, that the word *when* means any time after the arrival of the vessel, at the port where a new register can be legally obtained. And, according to Lord *Coke's* opinion, when one is bound to do an act, but no time fixed, the party has his whole life time allowed to perform it. Authorities were produced to show, that in the construction of even penal statutes, the spirit, and intent, and policy of the law might be called in aid, where words are doubtful. That it is impossible to procure the new register, until the certificate of registry is delivered up. That this cannot be done before her return from her voyage; and, until it is done, provided it be accomplished before her proceeding on another voyage, she is still to be considered

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port of *Philadelphia*. It will be attempted to maintain the affirmative on two grounds: 1st. That she had not then a register in force. 2d. That she was not then entitled to be registered anew. 1804.

1st. The

as holding her original character; and, therefore, not subject to the disabilities attached to a foreign ship. That if it were otherwise, the law would be oppressive on our own citizens, although its policy is grounded in a system to *serve* them, while it prohibited foreign ships from trading, on terms so beneficial as those of our own nation. That if the word "*when*" could not be satisfied, but by a new register, procured at the time of the sale, it would amount to an unjust and burthensome exclusion of all sales to citizens, of our vessels, in whole, or in part, while at sea, or on their voyages; to the great injury of our commerce, and ruinous embarrassment of our merchants, whose necessities, or plans, required transfers of their vessels, either to relieve them from pressures, or enable them to form new speculations. That such a rigorous construction might be justifiable, when ships *in port*, were sold or transferred, because the certificates of registry were attainable. But as the law does not compel parties to impossibilities (*lex non cogit ad impossibilia*) it is otherwise when ships are at sea. It satisfies the law, if the new register is applied for when the temporary impracticability is removed. True it is, that foreigners can never obtain new registers, under transfers, or sales from *American* citizens. All the precautionary measures of the law are aimed at *them*. The oath at the time of entry must disclose the owners; or foreign character will be presumed. This shows that if the oath is taken, and no foreign ownership appears, it is all the law requires, to establish the *American* character. But the character of the vessel sold by one *American* citizen to another, was not even *suspended*, by the clause under consideration, until after her departure, from the port whereat she could have obtained a new register, on her arrival from the voyage, during which the sale or transfer was made. It is, therefore, concluded that domestic, and not foreign, duties should have been charged on the goods, imported in the ship in question. And that as to the law of the 3d *March* 1803, it neither has or should have any influence on a precedent transaction. It only fixes the time *when* a new register must be applied for, which was before uncertain. It also gives power to the secretary of the treasury to remit penalties and forfeitures and remove disabilities, in past as well as future cases.

On behalf of the *United States* it was contended, that as no time was fixed in the law for renewing the register, it must be done *instanter*. Where a disability is the consequence, it cannot be removed till the renewal is completed. If it cannot be done at the moment, owing to impediments not then to be overcome, the party labouring under them must suffer temporary inconveniences, which it was in his power to foresee. In *England*, where the character of the ship is not altered, an arrangement was made of sending information of the transfer immediately to the custom house. According to *British* authorities, though they relate only to the validity of the transfer as between the parties, it is said 2 *East*, 404 that "if the act of parliament (dictating this measure) were to "be considered as giving an indefinite time (or even a reasonable time, "after the execution) for the compliance with its requisites; it would en- "able a transfer of property to be made to foreigners, who might remain "concealed owners, until the return of the vessel to her port, which might not "be for a great length of time." No time being fixed in the 14th section, it must be *instanter*. A number of extracts from the laws of the *United States* were produced to show, that all these laws required the strictest attention to their injunctions, under the severest penalties and forfeitures. That it is not denied that one citizen may sell and transfer to another a ship at sea. But if it is done, the sale is subject to inconveniences on which the parties ought to calculate, or take the consequences. The law is or ought to be known to every body. Those who are shippers of goods should make themselves masters of the subject, both as it relates to sales to citizens and to foreigners, or suffer any inconveniences arising from want of caution. It was asserted, that the fiscal officers had uniformly construed the law as it is now contended for. The congress

1804. 1st. The discussion does not turn upon the fact of *American* ownership, but upon the legal existence of an *American* register.

gress passing this law meant to exclude sales at sea, to prevent the use of our vessels covertly by foreigners. The register of the *Missouri* was vacated on the 12th *February* 1801. She was from that time subject to the disabilities of a foreign ship, till her character was revived. And that could not be done till after the 21st *December* 1802, when the legal bill of sale was made. No subsequent transaction can by relation operate on the duties chargeable, though the *character of the ship* may be restored. If the foreign character of the vessel existed at the time of the *liquidation*, no *ex post facto* proceedings can alter the then existing circumstances. There is no distinction in the law between a sale *in port*, or one *at sea*. An immediate application for a new register is required in both cases. If it cannot be had on a sale at sea, it shows the law meant to exclude the vessel for the time from her *American* character: *eo instanter*, that the property is changed, her character ceases, or is suspended, according as she is sold to a foreigner, or a citizen. A number of *British* cases were produced; and said to be analogous, though in *that* country they related to change of property. In *this* the principles apply to change of *character*. 3 *Term Rep.* 406. 3 *Brown Ch. Rep.* 571. 5 *Term*, 710. 2 *East*, 399 404. *Bosanquet and Puller. Parker*, 215. There is no distinction in the laws of the *United States*, as they relate to a sale either to a citizen or a foreigner, in the point of time, in which the *American* character ceases to operate. In both cases, the cessation is at the moment of sale. The citizen may revive it, but the foreigner never can.

The law of *March* 1803, was produced to show a legislative construction. And the custom of the fiscal offices was said to be a contemporaneous and continued interpretation. Although I may not have done justice to the arguments of the counsel on either side, I have thought it proper to recite them in a summary way, to show the conflict of opinion, on the subject.

For myself I declare, that, although the interpretation given on the part of the *United States*, is not consistent with my ideas of what the law *should have been*, I do not see that I am authorised judicially to pronounce that it was not, as on the part of the *United States* it is contended to *have been*, at the time of the transaction, which is the subject of discussion. It appears to me, that the congress, enacting the law of 1792, in their zeal to exclude foreigners, did not see, or chose to think lightly *of*, the inconveniences to which, in such cases, as the one now before me, they subjected our own citizens. It also seems to me a *case omitted*, either accidentally, or with design. The legislature alone were competent to remedy the defect. And they have done this in cases occurring after their act of *March* 1803. In the department in which I am placed, I am not competent to give relief; or by interpretations of supposed spirit and intention, supply omissions, or add to the provisions of the then existing law. In cases attended with such unmerited penalties, it is consolatory that the laws of our country have not left the parties without protection. The congress of 1803, sensible of the hardships consequent on a rigid construction of the former law, have specially and clearly authorised the secretary of the treasury to remit "*any foreign duties, which shall have been incurred*," by reason of disabilities, happening under the former laws, recited in the act of *March* 1803. There is no doubt in my mind, that this (the foreign duties having been incurred under the former laws, by a temporary disability and incapacity to obtain a new register) is a case proper for the deliberation of the officer vested with the power of mitigating or dispensing with the severity of fiscal laws. He may (if he so inclines under the circumstances stated to him) give the relief, which the austerity of judiciary duty disables a court from affording. Although this is my view of the subject I think it a hard case, and that it ought not to rest on my opinion. I shall deem myself bound to give every facility to an appeal. If other cases, depending on the same point, occur, I shall, on payment of the undisputed part of the demand, suspend judgment (or grant it on terms) for the contested sums, until the opinion of a superior court can be had; if the parties affected shall choose to take that course.

Let judgment be entered for the sum now due to the *United States*. I understand that the domestic duties in part of the bond have been paid.

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The object of the law was to secure to *American* citizens, the exclusive benefit of *American* tonnage and navigation. The means employed were directed, to ascertain, first, the fact that the vessel was *American* built; and, secondly, to trace every change of ownership, in whole, or in part. And the means being suited to the object, all theories, all arguments *ab inconvenienti*, must yield to the positive terms of the law, in this instance, as in numerous other instances of forfeiture under the navigation and revenue laws. In order to ascertain the changes, or transfers, of property, considerations respecting the transfer to *an alien*, whether the vessel was in port, or at sea, on the one hand; and, on the other hand, respecting the transfer to *a citizen*, whether the vessel was in port, or at sea, naturally occurred. Now, no *American* vessel, wherever she may be, if sold to an alien, can be registered anew. In *England* a bill of sale to an alien is void, without the consent of three-fourths of the owners, indorsed upon the certificate. In *America* there is no such provision; but still, upon a clandestine sale of a part owner, the innocent owners are protected to the amount of their interest in the vessel. 4 *vol. Acts Cong.* 11. *Abbot*, 45. 13 *G.* 3. *c.* 26. 2 *vol. Acts Cong. p.* 131. *s.* 16, 17. 7. *Ab.* 30. 26 *G.* 3. *c.* 60. *s.* 15. Again: An *American* vessel, if sold even to a citizen, must, upon every sale, in whole, or in part, be registered anew; the old register must be surrendered; the bill of sale must be in writing, containing a recital of the register; and on every entry, at a port of the *United States*, the mesne transfers must be disclosed. 2 *vol. p.* 131. *s.* 14. 17. In *England* a distinct provision is made for cases, in which vessels are sold, when in port; and for cases, in which they are sold, while at sea. For the former, it is required, that an indorsement shall be made on the register; or that the vessel be registered anew, at the option of the remaining owners, without which the sale is void. 7 & 8 *W.* 3. *c.* 22. *s.* 21. 34 *Geo.* 3. *c.* 68. *s.* 15. 21. And for the latter, it is required, in order to render the sale valid, that the bill of sale shall recite the register; that a copy of the bill of sale be delivered to the commissioners; that notice of the transfer be given at the ship's port; and that the indorsement be made on the register, when the ship returns. *Ibid.* But in *America*, the only provision in the case of a sale of a vessel at sea is contained in the 14th section of the law: 2 *vol. p.* 131. while the sale of a vessel in port is anxiously guarded as well by that section, as by the 14th, 11th, and 12th sections. The registering bond does not embrace the case of a sale while the vessel is at sea; the 17th section only requires a disclosure of the fact, without declaring any consequence; and, in short, it is only in the 14th section, that any provision is made for a formal bill of sale, for a surrender of the old register, or for the taking out of a new one. And yet, the policy which prescribes such guards against unlawful transfers, while a vessel is in port, operates more forcibly in the

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cases

1804. cases of a transfer, while a vessel is at sea. The legislative jealousy of sales abroad, is manifested, indeed, by the provision, which disqualifies citizens, resident in foreign countries (with a few exceptions) from being holders of *American* registered vessels. 2 *vol.* 132. *s.* 2. 134. *s.* 4. Then, if the policy of the law is general, so are the words of the 14th section of the act, embracing every sale of a vessel, in whole, or in part, at home, or abroad; and, to preserve the *American* privileges of the vessel, the requisites of the section are, a new register on the sale, a surrender of the old register, and a bill of sale, reciting the register. On the sale of the *Missouri*, to *Koch* and his associates, her old register ceased to be in force. A new one might be obtained, provided, at the time of applying for it, the old one was surrendered, and a bill of sale, in due form, was produced: but, after vacating the old register by a sale, the ship ceased to be privileged, until a new register was obtained. A formal bill of sale is a *sine qua non*, in every case; and, emphatically, it is necessary in the case of a sale, while a vessel is at sea, as the act of congress provides no other guard against an unlawful transfer. Besides, why should the 17th section merely require, upon the entry of a vessel from abroad, a disclosure of the fact, whether there has been any antecedent change of ownership, if it was not to bring the case within the provisions of the 14th section of the act? And if a vessel sold at home, is subject to the rigor of all the regulations of the 14th section, on what principle can a vessel sold abroad pretend to an exemption? Is it not more within the policy, spirit, and language, of the law, to say, that the vessel sold abroad, shall, like the vessel sold at home, lose her privilege upon the sale; and as the danger of unlawful sales is greater abroad, than at home, she shall remain unprivileged, until the actual renewal of her register? In illustration of the argument on this point, the following authorities were cited: 3 *T. Rep.* 406. 3 *Br. Ch.* 571. *S. C.* 5 *T. Rep.* 710. 7 *T. Rep.* 306. 2 *East*, 399. 1 *Bos. & Pull.* 483.

2d. Nor was the *Missouri* even entitled to be registered anew, at the time of her return to the port of *Philadelphia*. There did not than exist a bill of sale, reciting the register; and the recital might as easily be made from the record at the custom-house, as from the certificate of registry carried with the vessel.

The construction now contended for, has uniformly prevailed in the treasury department; and contemporaneous construction ought to be regarded in deciding upon a doubtful law. *Park*, 215. Legislative construction is, also, in favour of the *United States*, for the very case of a vessel sold while at sea, has been specially introduced into the system; 6 *vol.* 223. *s.* 3. the power to remit the foreign duties incurred by such sale has been vested in the secretary of the treasury; and legislative construction, of a legislative act, where the words are doubtful, ought to be conclusive. *Parker*, 217.

For

1804.

For Willings and Francis. In the present case, there is no suggestion of alien ownership, or *mala fides* of any kind. The meaning of the legislature should, therefore, be perfectly clear, before a decision inflicting, in effect, a heavy penalty, on the plaintiffs in error, is pronounced. The general policy of the law is, to give an advantage to the *American* citizen; and, if its language is at all obscure, he is entitled to the most beneficial interpretation. In this view of the controversy, the recapitulation of a few plain rules, will lead to a favourable result. 1st. A vessel can have but one register at the same time. 2d. The certificate of the registry is delivered to the master of the vessel, when he leaves the port, and must be deposited at the custom-house upon his return. 3d. The register remains in force, until it has been legally vacated, or cancelled. 4th. On a change of property, whether in whole, or in part, a new register must be taken out; but no new register can be granted until the old one is surrendered. 5th. The execution of a bill of sale, reciting the register, will not authorise the granting of a new register, without such surrender of the old one; but both must concur for that purpose.

In no part of the law is a particular time prescribed, either for the execution of a bill of sale, or for the application for a new register. The 14th section amounts to nothing more, than a declaration, that a vessel, which has been sold, in whole, or in part, shall not enjoy the *American* privileges, until she is registered anew; but the word "when" is not used as an adverb of time; nor does the section require, that the vessel shall be registered anew, at the moment of the transfer. If, therefore, the bill of sale is executed, and the old register surrendered, when an application is first made for the enjoyment of *American* privileges, the words and policy of the law are satisfied; nor will the court go beyond the words of a law to create a forfeiture. 1 *Bos. and Pull.* 483. 19 *Vin. Abr.* 512. *pl.* 8, 9. 3 *T. Rep.* 401. 2 *East*, 399. The 17th section of the act, however, seems to fix the sense of the legislature; for, it obviously contemplates the disclosure of a transfer, while the vessel was at sea; and if the oath, which it prescribes, is truly taken, there is no forfeiture of her *American* character.

The doctrine contended for, on behalf of the *United States*, would introduce the greatest mischiefs. Could congress mean, (in an act, too, for the benefit of *American* tonnage and navigation) so to tie up the property in ships, that, while they are at sea, they could not be sold, without incurring a forfeiture of their privileges? And is it consistent with justice and reason, that the innocent shippers of a cargo on board an *American* vessel, should be taxed with the payment of foreign duties, in consequence of successive transfers, to which they were neither parties, nor privies? To these inconveniences, the claim of foreign duties, in this case, adds the reproach, that congress has required

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1804. an impossibility; to wit, the immediate surrender of the register at the custom-house, while, in fact, it was on board of the vessel, at sea.

As to a contemporary construction, it is not clearly and uniformly shown, in favour of the adverse doctrine; nor, if it were, could it prevail against the plain words and obvious meaning of the law. And, as to a supposed legislative construction, of the act of the 2d of *March* 1803 (6 *vol.* 223. *s.* 3. *s.* 4.) the act is merely affirmative; and even if it were declaratory of the legislative opinion, upon the previous state of the law, it could not be binding upon the judges, who must exercise their own judgments upon the law itself, independent of legislative exposition.

WASHINGTON, *Justice.* Although the pleadings, in this case, are lengthy, it has been agreed by both parties, that the only question, to be considered and decided, upon the whole record, is, whether the cargo, imported in the ship *Missouri*, is subject to the payment of foreign, or of domestic, duties?

By the first section of the "act concerning the registering and "recording of ships, or vessels," passed on the 31st of *December* 1792, it was provided, that all vessels, registered pursuant to that law, should be denominated and deemed vessels of the *United States*: and all vessels of the *United States*, are entitled, by law, to certain benefits and privileges, denied to foreign vessels; so long as they shall continue to be wholly owned, and to be commanded, by a citizen, or citizens, of the *United States*.

The ship *Missouri* was a duly registered vessel of the *United States*, and has always continued to be owned, and commanded, by citizens. She was, therefore, entitled to the benefits and privileges of her *American* character, when she arrived at the port of *Philadelphia*, in *November* 1802; unless the partial sale made to *American* citizens, while she was at sea, deprived her of that character. Whether the transaction referred to, produced such an effect, may, I think, be decided upon a joint consideration of the fourteenth, and first sections, of the registering act alone; though other sections will afford fair ground for reasoning and illustration.

The 14th section is composed of several sentences, which must be distinctly, as well as collectively, considered, to ascertain the general meaning and result. The first sentence declares, that when a registered vessel is sold to a citizen, she shall be registered anew, by her former name, or she shall cease to be deemed a vessel of the *United States*; and that her former register shall be delivered up, at the time of applying for a new one. The second sentence declares, that in every such case of sale, or transfer, there shall be a bill of sale, reciting, at length, the certificate of registry, otherwise the vessel shall be incapable of being registered anew. And the third sentence declares, generally,

nerally, that in every case, in which a vessel is required to be registered anew, she shall not be intitled to the privileges of a vessel of the *United States*, if she is not so registered. 1804.

It is difficult to conjecture, why, in the first sentence, the want of a new register should be declared, within a parenthesis, to deprive a vessel of her *American* character; and that, in the third sentence, the same effect should be again declared, for the same cause. The latter declaration, however, is obviously tautology: for, if the former declaration can be said to have destroyed the privilege, *eo instanti*, when the sale was effected; it was useless and superfluous to repeat, that the vessel should not, at any subsequent period, be entitled to enjoy it. The clear meaning, however, of both sentences, appears to be, that the vessel should lose her *American* privileges, not simply upon the sale, but upon the neglect to obtain a new registry, after the sale. It is here, then, material to inquire, in what manner, and on what terms, a new registry can be obtained? A bill of sale, reciting the old certificate of registry, must be produced to the collector. The old certificate of registry must, also, be surrendered. Now, though a bill of sale might be formally executed, in the absence of the ship; yet, the ship is bound, by law, to carry the certificate of her registry with her; and, consequently, it is impossible for her owner, to surrender that instrument to the collector while she is herself at sea. If, however, the surrender of the certificate must be made, or the privilege must be lost, it is manifest, that the law either requires the performance of an impossibility (which is not hastily to be imputed to the expression, and never to the intention of a law) or it prohibits, in effect, the sale of a ship, at sea, by one of our citizens, to another.

There is no part of our navigation system, that expressly avows this to be the intention of the legislature; and from what principle of public policy can it be inferred, or presumed? The cargo is not liable to the claim of foreign duties, until an actual sale of the ship; and why should the owner of the cargo lose his privilege, on account of the sale, which is an act of the owner of the ship alone? Or be punished as for a fault, on account of the neglect of the owner of the ship, to take out a new register; an omission which the owner of the cargo can neither prevent, nor supply? Even, however, with respect to the ship, why, I repeat, should the privilege be lost, and her owner punished as for a fault, in omitting to deliver an instrument to the collector on shore, which the law directs to be kept on board her at sea? A consequence more injurious, would not proceed from a sale to an alien; and yet, in the case of a sale to an alien, the act of congress declares the forfeiture of the *American* privilege in express words; as being incurred, *eo instanti*, on the sale; but no such declaration is made, in the case of a sale to a citizen.

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It appears to me, that the *fourth* sentence of the 14th section of the act is, also, important; for, it declares, that "if the former "certificate of registry shall not be delivered up *as aforesaid*, the "owner, or owners of the ship, or vessel, shall forfeit and pay "the sum of 500 dollars:" And thus, if the construction contended for, by the attorney of the *United States* is correct, the law not only prohibits the sale of a vessel at sea, by one citizen to another on pain of forfeiting, at the moment of sale, the privileges of the vessel; but subjects the owner to a penalty, although it is physically impossible, that he should do the thing, for the omission of which he is to be punished.

But an *American* vessel does not cease to be entitled to her privilege, any more by the act of sale, than by the act of altering her form, or burthen; both cases being embraced by the provisions of the 14th section. Let us suppose, therefore, that the construction of the vessel should be altered, either in the port to which she belongs, or in any other port: would she lose her privilege, before the owners could have an opportunity to apply for a new registry? And if not, why should the privilege be lost, before an opportunity occurs to make the application for a new registry, in the case of a sale? I can perceive no reason for a distinction.

As to the provisions of the 17th section, they are designed to compel a discovery of any transfers of a vessel, which may have been made, during her absence from the port; in order that it might appear, whether she continued to be a privileged vessel of the *United States*. If it appeared, that she had been transferred to a foreigner, her privileges were forfeited, from the moment of transfer; and if it appeared that she had been sold to a citizen, the officers of the customs were enabled, by a knowledge of the fact, to exact the foreign duties, in future, should no application be made for a new registry.

I am, upon the whole, of opinion, that the appellants are not liable for higher duties, than are payable by vessels of the *United States*; and, consequently, the judgment of the District Court must be reversed.

Judgment reversed. (1)

(1) On this decision a writ of error was brought, which is now depending in the Supreme Court of the *United States*.

CIRCUIT COURT,

PENNSYLVANIA DISTRICT.

October Term 1804.

Present WASHINGTON, Associate Judge of the Supreme Court.
PETERS, District Judge.

Hurst's Case.

ON the affidavit of *Timothy Hurst*, it appeared, that he had come from his residence at *New-York*, to attend the trial of *Hurst v. Hurst* (in which he was a party) at the present term; that after his arrival he had been subpœnaed as a witness, in the case of *W. Hurst v. Rodney*, which was, also, upon the trial list; that yesterday (the 13th of *November*) while he was at his lodgings, in *Hardy's* tavern, he had been arrested by the sheriff upon a *ca. sa.* issuing from the Supreme Court of *Pennsylvania*; and that he had come to *Philadelphia*, and was remaining here, at the time of the arrest, only upon the business of his suit, and in obedience to the subpœna.

Ingersoll, upon these facts, moved, that *Hurst* should be discharged from the custody of the sheriff. And he argued, in support of the motion, 1st. That the application was properly addressed to this Court, and not to the Supreme Court. 2d. That a discharge from the *ca. sa.* by order of the court, without the consent, or concurrence, of the plaintiff, would not operate as a satisfaction of the debt; and another execution might afterwards be taken out. 3d. That the discharge by a competent Court, would excuse and protect the sheriff, in an action for an escape. *Barnes* 2. *Ld. Raym.* 1524. *Bac. Abr.* 631. 5 *T. Rep.* 686. 5 *Bac. Abr.* 617.

1804. 617. 673. 1 *H. Bl.* 636. *Tidd Pr.* 61, 2. 2 *Stra.* 990. 1 *Dall. Rep.* 356. (1) 3 *Dall.* 478. *Dy.* 60. *a.*

Rawle, in opposition to the discharge, insisted, that, under the circumstances of this case, *Hurst* was neither privileged as a witness, nor as a party. 1st. Not as a witness. The arrest was made at the lodgings of the defendant: but although a witness is privileged, while he is going from home, while he is actually attending the Court, and while he is returning to his home; he is not privileged while he is at home. 2d. Not as a party. If the privilege of a party is not limited to the same times and places, as the privilege of a witness, its extent is indefinite, and its operation unequal. Is a suitor in this Court, residing in *Georgia*, protected from arrest, as soon as he receives the notice of trial, in his own state, and in every state, through which he passes, on his journey to *Philadelphia*? Again: Is every resident citizen of *Philadelphia*, who has a suit depending, privileged during the trial term, not only while actually attending the Court, but while at home, with his family? And if not, why should a non-resident suitor be protected at his lodgings, which are his home? There is, indeed, a distinction between the cases, favourable to the witness; for, a witness is under an absolute obligation to attend the Court; but a party may prosecute his suit by an attorney, without personal attendance. Besides, the sheriff will be bound to show a regular discharge, in an action for an escape; and if the Supreme Court should adhere to the rule in *Sterret's* case, the order of this Court will not be a justification. 1 *Brownl.* 15. *Barn.* 200. 5 *T. Rep.* 686. 2 *Cha. Ca.* 69. *T. Raym.* 100. 2 *Ld. Raym.* 1524. 6 *Com. Dig.* 89. 88. *Woods Inst.* 478. 2 *Bro. Abr.* 159. *Tit. Priv. pl.* 37.

WASHINGTON, *Justice.* I will not examine the powers of the Supreme Court of the state, upon the present occasion. It is enough to assertain, that the power of this Court is competent to the object proposed. If, indeed, any injury would be done either to the plaintiff in the suit, or to the sheriff (both of whom have acted innocently, and without knowledge of the facts, on which the claim of privilege arises) by our interposition, we might be induced to pause upon the subject. But, as to the plaintiff, it is clear, that he may renew his execution, whenever the privilege ceases: And, as to the sheriff, the order of a Court of competent jurisdiction, touching the subject matter, must be a conclusive justification in every other Court, acting upon sound principles of law and justice.

To decide the principal question, therefore, I find it necessary to go no further, than to state, that I think the witness was, in

(1) It was admitted by the counsel, on both sides, that the authority of *Sterret's* case, had been often doubted, both on the bench, and at the bar, though never expressly over-ruled.

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this case, privileged, while he was at his lodgings. The subpœna was in force; and the arrest of the witness at that place, has all the effects which could be produced by an arrest in the streets, while coming to, or going from, the Court. 1804.

PETERS, *Justice*. I concur in the sentiments, that have been expressed by the presiding judge; and add, as my separate opinion, that the party is intitled to be discharged, upon both the grounds of privilege.

A special order of discharge was, accordingly, made, and filed; at the instance of *Dallas*, who appeared for the sheriff.

Walker *et al. versus* Smith.

CASE. On the trial of this cause, the following facts appeared: The plaintiffs were merchants of *London*; and in *March* 1796, shipped and consigned to the defendant certain goods, invoiced at 270*l.* 14*s.* 8*d.* sterling, accompanied with a letter, stating that "these goods were shipped by order of Mr. *J. B.* and "for his account; and he was to remit us the amount on his ar- "rival at *Philadelphia*: but since they were shipped, some cir- "cumstances have occurred, which have created some doubts, "in our minds, respecting his solidity; and by the advice of our "friends, we have adopted this method to secure ourselves "through your friendly assistance, which we request on this oc- "casion. As we do not want to deprive *B.* of the benefits to be "derived from the sale of these goods, we wish you to hold them "at his disposal, but not to deliver them to him, without being "paid for the amount, or having such security given you there- "for, as is satisfactory to yourself. Should he not be able to ef- "fect either of these, in a reasonable time, we would wish you "to dispose of them for our account, and remit us the amount "in good bills." The defendant duly received the goods, but delivered them over to *B.* without receiving payment, or exacting security; and shortly afterwards *B.* failed. The defendant, however, representing other creditors of *B.*, as well as the plaintiffs, made a composition, by which he received for the proportion of the plaintiffs 151*l.* 16*s.* sterling, and remitted that sum to them, without charging commissions, in a letter dated the 11th of *December* 1800. The plaintiffs refused to ratify the composition, and brought the present suit to recover the invoice value of the goods, with interest according to the usage of trade.

On the trial, *Ingersoll* assumed three grounds of defence: 1st. That there was no cause of action; as the defendant had accepted the consignment, on principles of mere curtesy, without interest directly, or indirectly; and had exercised a fair and impar-

tial

1804. tial discretion, for the equal interest of all the creditors of *B.* 2d. That even if the action could be maintained, it is a case, in which the jury are at liberty to give less by way of damages, than the amount of the loss actually proved. 1 *Dall. Rep.* 180. 2 *Wils.* 328. 2 *Bac. Abr.* 266. *Bull. N. P.* 156. 1 *Esp. N. P.* 179. 3d. That the defendant, acting as a general consignee, may be considered as selling the goods to *B.*, and, consequently, is not liable to his principal, for more than he actually received. *Willes Rep.* 407.

For the plaintiffs, *J. Sergeant* and *Dallas* contended, 1st. That although the defendant was not obliged to accept the consignment, yet, if he did accept it, he was answerable, like every other agent, or factor, for a breach of the positive orders of his principal. 1 *Beawes L. M.* 44. 46. *Moll.* 493. 497. 4 *Com. Dig.* 227, 8. 2 *Cha. Cases*, 57. 4 *Rob.* 218. 1 *Marsh.* 206, 7. 209, 210. 2d. That although the jury had a great and useful latitude in cases of tort, and mixed cases of negligence and tort, where no precise standard of damages was established; the legal discretion of a jury, could indulge in no capricious, or conjectural, estimate, in cases of contract, express, or implied, where a mere calculation of figures furnishes a certain and uniform standard of right. 2 *Bl. Rep.* 942. 4 *T. Rep.* 654, 5. 5 *T. Rep.* 255. *Barnes*, 455. 448. 1 *Stra.* 425. 3d. That on these principles the defendant was liable for the debt, as if he were a purchasor of the goods; and every purchasor is chargeable with interest, after the usual term of credit is expired. 1 *Dall. Rep.* 265. *Doug.* 361. 2 *Bos. & Pull.* 337. *Crawford* v. *Willing. ant.*

The COURT, in their charge to the jury, expressly declared an opinion, that, on the evidence, the plaintiffs were entitled to recover the full amount of the original debt, with such reasonable compensation for the delay of payment, as the jury should think proper.

The jury, however, gave a verdict for only 468 dollars 44 cents, which was the amount of the plaintiffs' demand (after crediting the remittance) estimating the sterling money at par, allowing the defendant a commission, and deducting the interest. The jury added, that the plaintiffs should pay the costs. (1)

(1) The finding of the jury, that the plaintiffs should pay the costs, was, at once, abandoned by the defendant's counsel, on general principles; but *Ingersoll* stated, that the first judicial law provided, that the plaintiff should not be allowed costs, if he recovered a sum less than 500 dollars; 6 *vol.* 16. *s.* 3. 1 *vol.* 61. *s.* 20. and that although the action was instituted, when the sum required, in that respect, was only 400 dollars; yet, he referred to a decision of Judge CHASE'S, in the Circuit Court of *Delaware*, which pronounced, that the act repealing the latter provision, revived the former, and was to be applied to all suits present, or future. *Dallas* referred, however, to the acts of congress: 5 *vol.* 237. *s.* 11. 6 *vol.* 16. *s.* 4. And the COURT declared that the plaintiffs were clearly entitled to costs.

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The plaintiffs' counsel then moved for a new trial, because the verdict was against law, evidence, and the charge of the Court: but, after argument, the motion was over-ruled; and it was observed by WASHINGTON, *Justice*, that although he was not satisfied with the verdict, nor should he have assented to it as a juror; yet, the question of damages, or of interest in the nature of damages, belonged so peculiarly to the jury, that he could not allow himself to invade their province; while he felt a determination to prevent, on their part, any invasion of the judicial province of the Court. 1804.

CIRCUIT COURT,

PENNSYLVANIA DISTRICT.

April Term 1805.

Present WASHINGTON, an Associate Judge of the Supreme Court.
PETERS, District Judge.

Huidekoper's Lessee *versus* Douglass.

THIS was an ejectment brought for a tract of land, lying north and west of the rivers *Ohio* and *Alleghany*, and *Conewango* creek. The lessor of the plaintiff made title under the *Holland* company, to whom a patent was issued, upon a warrant and survey. The defendant claimed as an actual settler, under the act of the 3d of *April* 1792. A great many ejectments were depending upon the same facts and principles; (1) and on the trial, of another ejectment, at a former term, WASHINGTON, *Justice*, had delivered a charge to the jury, coinciding, generally, with the construction given by the Supreme Court of *Pennsylvania*, to the act of *April* 1792, from which Judge PETERS dissented. It was, therefore, upon the recommendation of the Court, determined to submit the questions, upon which the opinions of the Judges were opposed, to the Supreme Court of the *United States*, under the provision made, in case of such a disagreement, by the act of the 29th of *April* 1802. 6 *vol.* 89. *s.* 6. The questions were, accordingly, stated, at the last *October* term, in the following form:

" 1st. Whether under the act of the legislature of *Pennsylvania* passed on the 3d day of *April* 1792, entitled " an act for the sale of the vacant lands within this commonwealth:" the grantee by warrant of a tract of land lying " north and west of the

(1) For a general view of this important controversy, see the cases reported *ante. p.* 170. *The Commonwealth* v. *T. Coxe*, 237. *Attorney General* v. *The Grantees under the Act of April* 1792. and *ante, p.* 363. *Balfour's Lessee* v. *Meade.*

rivers

"rivers *Ohio* and *Alleghany*, and *Conewango* creek," who, by force of arms of the enemies of the *United States*, was prevented from settling and improving the said land, and from residing thereon, from the 10th day of *April* 1793, the date of the said warrant, until the 1st day of *January* 1796, but who, during the said period, persisted in his endeavours to make such settlement and residence, is excused from making such actual settlement, as the enacting clause of the 9th section of the said law prescribes, to vest a title in the said grantee. 1805.

"2d. Whether a warrant for a tract of land, lying north and west of the rivers *Ohio* and *Alleghany*, and *Conewango* creek, granted in the year 1793, under, and by virtue of the act of the legislature of *Pennsylvania*, entitled "An Act for the sale of vacant lands, within this commonwealth," to a person, who by force of arms of the enemies of the *United States*, was prevented from settling and improving the said land, and from residing thereon, from the date of the said warrant, until the first day of *January* 1796, but who, during the said period, persisted in his endeavours to make such settlement and residence, vests any, and if any, what title in or to the said land, unless the said grantee shall after the said prevention ceases, commence, and within the space of two years thereafter clear, fence and cultivate, at least two acres contained in his said survey, erect thereon a messuage for the habitation of man, and reside or cause a family to reside thereon, for the space of five years next following his first settling the same, the said grantee being yet in full life.

"3d. Whether a grantee in such warrant as aforesaid, who has failed to make such settlement as the enacting clause of the said ninth section requires, and who is not within the benefit of the proviso, has thereby forfeited his right and title to the said land, until the commonwealth has taken advantage of the said forfeiture, so as to prevent the said grantee from recovering the possession of said land in ejectment, against a person who, at any time after two years from the time the prevention ceased, or at any subsequent period, has settled and improved the said land and has ever since been in possession of the same."

The questions were argued in the Supreme Court, at *February* term 1805, by *E. Tilghman*, *Ingersoll*, *Lewis* and *Dallas*, for the plaintiff; and by *M'Kean* (attorney general of *Pennsylvania*) and *W. Tilghman*, for the defendant.

The opinion of the Court was delivered by the *Chief Justice*, in the following manner.

MARSHALL, *Chief Justice*. The questions which occurred in this case, in the Circuit Court of *Pennsylvania*, and on which the opinion of this court is required, grow out of the act passed by

1805. the legislature of that state, entitled "An Act for the sale of the vacant lands within this commonwealth."

The ninth section of that act, on which the case principally depends, is in these words: "And be it further enacted by the "authority aforesaid, that no warrant or survey, to be issued or "made in pursuance of this act, for lands lying north and west of "the rivers *Ohio* and *Alleghany* and *Conewango* creek, shall vest any "title in or to the lands therein mentioned, unless the grantee has, "prior to the date of such warrant, made, or caused to be made, or "shall, within the space of two years next after the date of the same, "make, or cause to be made, an actual settlement thereon, by "clearing, fencing and cultivating at least two acres for every "hundred acres contained in one survey, erecting thereon a "messuage for the habitation of man, and residing, or causing a "family to reside thereon, for the space of five years next fol-"lowing his first settling the same, if he or she shall so long live; "and that in default of such actual settlement and residence, "it shall and may be lawful to and for this commonwealth to "issue new warrants to other actual settlers for the said lands, "or any part thereof, reciting the original warrants, and that ac-"tual settlements and residence have not been made in pursu-"ance thereof, and so as often as defaults shall be made, for the "time and in the manner aforesaid, which new grants shall be "under and subject to all and every the regulations contained "in this act. *Provided always, nevertheless*, that if any such ac-"tual settler, or any grantee in any such original or succeeding "warrant, shall by force of arms of the enemies of the *United* "*States*, be prevented from making such actual settlement, or be "driven therefrom, and shall persist in his endeavours to make "such actual settlement as aforesaid, then, in either case, he "and his heirs shall be entitled to have and to hold the said "lands, in the same manner as if the actual settlement had been "made and continued."

The questions to be considered, relate particularly to the proviso of this section; but, to construe that correctly, it will be necessary to understand the enacting clause, which states what is to be performed by the purchaser of a warrant, before the title to the lands described therein, shall vest in him.

Two classes of purchasers are contemplated.

The one has already performed every condition of the sale, and is about to pay the consideration money; the other pays the consideration money in the first instance, and is, afterwards, to perform the conditions. They are both described in the same sentence, and, from each, an actual settlement is required as indispensable to the completion of the title. In describing this actual settlement, it is declared that it shall be made in the case of a warrant previously granted, within two years next after the date of such warrant, "by clearing, fencing, and cultivating at least

"two

"two acres for every hundred acres contained in one survey, 1805.
"erecting thereon a messuage for the habitation of man, and re-
"siding or causing a family to reside thereon for the space of
"five years next following his first settling of the same, if he or
"she shall so long live."

The manifest impossibility of completing a residence of five years within the space of two years, would lead to an opinion, that the part of the description relative to residence, applied to those only who had performed the condition before the payment of the purchase money, and not to those who were to perform it afterwards. But there are subsequent parts of the act, which will not admit of this construction, and, consequently, residence is a condition required from the person who settles under a warrant, as well as from one who entitles himself to a warrant by his settlement.

The law, requiring two repugnant and incompatible things, is incapable of receiving a literal construction, and must sustain some change of language to be rendered intelligible. This change, however, ought to be as small as possible, and with a view to the sense of the legislature, as manifested by themselves. The reading, suggested by the counsel for the plaintiff, appears to be most reasonable, and to comport best with the general language of the section, and with the nature of the subject. It is by changing the participle into the future tense of the verb, and instead of "and "residing or causing a family to reside thereon," reading, and *shall reside*, &c. The effect of this correction of language, will be to destroy the repugnancy which exists in the act as it stands, and to reconcile this part of the sentence to that which immediately follows, and which absolutely demonstrates that, in the view of the legislature, the settlement and the residence consequent thereon, were distinct parts of the condition; the settlement to be made within the space of two years from the date of the warrant, and the residence in five years from the commencement of the settlement.

This construction is the more necessary, because the very words "such actual settlement and residence," which prove that residence is required from the warrantee, prove, also, that settlement and residence are, in contemplation of the law, distinct operations. In the nature of things, and from the usual import of words, they are, also, distinct. To make a settlement, no more requires a residence of five, than a residence of five hundred, years: and, of consequence, it is much more reasonable to understand the legislature as requiring the residence for that term, in addition to a settlement, than as declaring it to be a component part of a settlement.

The meaning of the terms, settlement and residence, being understood, the Court will proceed to consider the proviso.

That

1805. That part of the act treats of an actual settler, under which term is intended as well the person who makes his settlement the foundation of his claim to a warrant, as a warrantee, who had made an actual settlement in performance of the conditions annexed to his purchase, and if "any grantee in any such original "or succeeding warrant," who must be considered as contradistinguished from one who had made an actual settlement. Persons thus distinctly circumstanced, are brought together in the same sentence, and terms are used appropriated to the situation of each, but not applicable to both. Thus, the idea of "an "actual settler," "prevented from making an actual settlement," and, after "being driven therefrom," "persisting in his endeavours" to make it, would be absurd. To apply to each class of purchasers, all parts of the proviso, would involve a contradiction in terms. Under such circumstances, the plain and natural mode of construing the act, is to apply the provisions, distributively, to the description of persons to whom they are adapted, *reddendo singula singulis*. The proviso, then, would read thus, "*Provided* "*always, nevertheless*, that if any such actual settler, shall be "driven from his settlement, by force of arms of the enemies of "the *United States;* or any grantee, in any such original or suc- "ceeding warrant, shall by force of arms of the enemies of the *Uni-* "*ted States*, be prevented from making such actual settlement, and "shall persist in his endeavours, to make such actual settlement as "aforesaid, then, in either case, he and his heirs shall be entitled "to have and to hold the said lands, in the same manner as if "the actual settlement had been made and continued." The two cases are the actual settler, who has been driven from his settlement, and the warrantee, who has been prevented from making a settlement, but has persisted in his endeavours to make one.

It is perfectly clear, that in each case, the proviso substitutes something for the settlement to be made within two years, from the date of the warrant, and for the residence to continue five years, from the commencement of the settlement, both of which were required in the enacting clause. What is that something?

The proviso answers, that in case of "an actual settler," it is his being "driven from his settlement, by force of arms of the enemies of the *United States*," and in case of his being a grantee of a warrant, not having settled, it is "persisting in his endeavours to make such actual settlement." In neither case is residence, or persisting in his endeavours at residence, required. Yet the legislature had not forgotten, that by the enacting clause, residence was to be added to settlement; for in the same sentence they say, that the person who comes within the proviso, shall hold the land "as if the actual settlement had been made and continued."

It is contended on the part of the defendant, that as the time, during which persistance shall continue, is not prescribed, the person

son claiming the land, must persist until he shall have effected both his settlement and residence, as required by the enacting clause of the act: that is, that the proviso dispenses with the time, and only with the time, during which the condition is to be performed. 1805.

But the words are not only inapt for the expression of such an intent; they absolutely contradict it.

If the proviso be read so as to be intelligible, it requires nothing from the actual settler who has been driven from his settlement. He is not to persist in his endeavours at residence, or in other words, to continue his settlement, but is to hold the land. From the warrantee who has been prevented from making a settlement, no endeavours at residence are required. He is to "persist in his endeavours," not to make and to continue such actual settlement, but "to make such actual settlement as aforesaid." And if he does persist in those endeavours, he is to hold the land "as if the actual settlement had been made and continued." The construction of the defendant would make the legislature say, in substance, that if the warrantee shall persist in endeavouring to accomplish a particular object, until he does accomplish it, he should hold the land as if he had accomplished it. But, independent of the improbability that the intention to dispense only with the time, in which the condition was to be performed, would be expressed in the language which has been noticed, there are terms used, which seem to restrict the time, during which a persistance in endeavours is required. The warrantee is to persist in his endeavours "to make such actual settlement "as aforesaid:" now, "such actual settlement as aforesaid" is an actual settlement within two years from the date of the warrant, and as it could only be made within two years, a persistance in endeavouring to make it, could only continue for that time.

If after being prevented from making an actual settlement, and persisting in endeavours, those endeavours should be successful within the two years; after which the person should be driven off, it is asked what would be his situation?

The answer is a plain one. By persisting, he has become an actual settler; and the part of the proviso which applies to actual settlers protects him.

If after the two years he should be driven off, he is still protected. The application of external violence dispenses with residence. The court feels itself bound to say so, because the proviso contains a substitute, which, in such a state of things, shall be received instead of a performance of the conditions required by the enacting clause; and of that substitute residence forms no part.

In a great variety of forms and with great strength, it has been argued, that the settlement of the country was the great object of the act; and that the construction of the plaintiff would defeat that object.

That

1805.

That the exclusive object of an act to give lands to settlers, would be the settlement of the country, will be admitted; but that an act to sell lands to settlers, must have for its exclusive object the settlement of the country, cannot be so readily conceded. In attempting to procure settlements, the treasury was certainly not forgotten. How far the two objects might be consulted, or how far the one yielded to the other, is only to be inferred from the words in which the legislative intention has been expressed. How far the legislature may have supposed the peopling of the district in question to have been promoted by encouraging actual settlements, though a subsequent residence on them should be rendered impracticable by a foreign enemy, can only be shown by their own language. At any rate, if the legislature has used words dispensing with residence, it is not for the court to say they could not intend it, unless there were concomitant expressions, which should explain those words, in a manner different from their ordinary import. There are other considerations in favour of the construction to which the court is inclined.

This is a contract, and although a state is a party, it ought to be construed according to those well established principles which regulate contracts generally.

The state is in the situation of a person, who holds forth to the world the conditions, on which he is willing to sell his property.

If he should couch his propositions in such ambiguous terms that they might be understood differently: in consequence of which sales were to be made, and the purchase money paid, he would come with an ill grace into court to insist on a latent and obscure meaning, which should give him back his property, and permit him to retain the purchase money. All those principles of equity and of fair dealing, which constitute the basis of judicial proceedings, require that courts should lean against such a construction.

It being understood that the opinion of the court on the two first questions, has rendered a decision of the third unnecessary, no determination respecting it has been made. (1)

It is directed that the following opinion be certified to the circuit court.

1. That it is the opinion of this Court, that under the act of the legislature of *Pennsylvania* passed the third day of *April*, in the year of our Lord one thousand seven hundred and ninety-two, entitled "An act for the sale of vacant lands within this commonwealth," the grantee, by a warrant, of a tract of land lying north and west of the rivers *Ohio* and *Alleghany* and *Conewango* creek, who by force of arms of the enemies of the *United*

(1) Although no opinion was publicly delivered, on the third question, it was understood, that the subject had been generally considered by the Court; and my information (which does not, however, proceed from the judges themselves) states the result to have been favourable to the grantee.

State

States was prevented from settling and improving the said land, and from residing thereon from the tenth day of *April* one thousand seven hundred and ninety-three, the date of the said warrant, until the first day of *January* in the year one thousand seven hundred and ninety-six, but who during the said period persisted in his endeavours to make such settlement and residence, is excused from making such actual settlement as the enacting clause of the ninth section of the said law prescribes, to vest a title in the said grantee. 1805.

2. That it is the opinion of this court, that a warrant for a tract of land lying north and west of the rivers *Ohio* and *Alleghany* and *Conewango* creek, granted in the year one thousand seven hundred and ninety-three, under, and by virtue of the act of the legislature of *Pennsylvania*, entitled, "An act for the sale of vacant "lands within this commonwealth," to a person who, by force of arms of the enemies of the *United States*, was prevented from settling and improving the said land, and from residing thereon, from the date of the said warrant until the first day of *January* in the year 1796; but who, during the said period, persisted in his endeavours to make such settlement and residence, vests in such grantee a fee simple in the said land; although after the said prevention ceased, he did not commence, and, within the space of two years thereafter clear, fence, and cultivate, at least two acres for every hundred acres contained in his survey for the said land, and erect thereon a messuage for the habitation of man, and reside, or cause a family to reside thereon, for the space of five years next following his first settling of the same, the said grantee being yet in full life.

Upon this opinion of the Supreme Court, the cause was again brought before a jury; the title was legally deduced from the state to the lessor of the plaintiff; and the facts of a prevention from making an improvement and settlement, under the 9th section of the act of *April* 1792, by a subsisting *Indian* war, as well as the facts of a persistance in the endeavour to make such improvement and settlement, were established, in detail, as they appear in the case of *The Commonwealth* v. *Coxe*, *ante. p.* 170. After argument, by *Ingersoll*, *E. Tilghman*, *Lewis*, and *Dallas*, for the plaintiff; and by *M'Kean*, *W. Tilghman*, and *M. Levy*, for the defendant, the following charge was delivered to the jury.

WASHINGTON, *Justice.* The plaintiff appears before you with a regular paper title from the warrant to the patent.

When this cause was tried before, the counsel for the defendant insisted, that the plaintiff's title was built upon a contract, which he had not complied with, that he was to make a settlement, such as the enacting clause of the 9th section requires, unless prevented from doing so, by the enemies of the *United States;* in which latter case, he was not only to prove a persistance in endeavours

1805. deavours to make the settlement, during the period of the war; but was to go on to make it, after the prevention ceased. This question was so difficult, as to divide, not only this Court, but the Courts of this state. The question was adjourned to the Supreme Court, who have decided, that a warrantee, who, from *April* 1793, to the 1st of *January* 1796, was prevented, by the enemies of the *United States*, from making such settlement as the law required, but who, during that period, persisted in his endeavours to make such settlement, is entitled to hold his land in fee simple, although, after the prevention ceased, he made no attempt to make such settlement. This we must consider as the law of the land, and govern our decision by it.

The questions then are,

1st. Was the *Holland* Company, from *April* 1793, to *January* 1796, prevented from making their settlement? and,

2d. Did they persist in endeavours, during that period, to make it?

What is the legal meaning of prevention, and persistance in endeavours? Were they prevented, and did they persist, within this meaning? The first are questions of law, which the Court are to decide; the latter are questions of fact, proper for your determination. What were they prevented from doing, in order to excuse them? The answer is, from clearing, fencing, and cultivating, two acres of land in every hundred acres contained in their warrant, from building a house thereon, fit for the habitation of man, and from residing, or causing a family to reside thereon. To what extent were their endeavours to go? The answer is, to effect these objects. It was not every slight or temporary danger, which was to excuse them from making such settlement, but such as a prudent man ought to regard. The plaintiffs stipulated to settle as a society of husbandmen, not as a band of soldiers. They were not bound to effect every thing which might be expected from military men, whose profession is to meet, to combat, and to overcome danger. To such men it would be a poor excuse, to say, they were prevented by danger, from the performance of their duty. The husbandman flourishes in the less glorious, but not less honourable, walks of life. So far from the legislature expecting, that they were to brave the dangers of a savage enemy, in order to effect their settlements, they are excused from making them, if such dangers exist. But they must persist in their endeavours to make them, that is, they are to persist if the danger is over, which prevented them from making them. For it would be a monstrous absurdity to say, that the danger, which, by preventing them from making the settlements, would excuse them, would not, at the same time, excuse them from endeavours to make them, so long as it existed. It would be a mockery to say, that I should be excused from putting my finger into the blaze of this candle, provided I would persevere in my endeavours to do it,

it, because, by making the endeavours, I could do it, although the consequences would be such as I was excused from incurring. If, then, the company were prevented from making their settlements, by dangers from a public enemy, which no prudent man would or ought to encounter, and if they made those endeavours, which the same man would have made, to effect the object, they have fully complied with the proviso of the 9th section. How then are the facts? That a public war between the *United States* and the *Indian* tribes, subsisted from *April* 1793, and previous to that period, until late in 1795, is not denied; and, though the great theatre of the war lay far to the north west of the land in dispute, yet it is clearly proved, that this country, during this period, was exposed to repeated irruptions of the enemy, killing and plundering such of the whites as they met with, in situations where they could not defend themselves. What was the degree of danger produced by those hostile incursions, can only be estimated by the conduct of those, who attempted to face it. We find them sometimes working out in the day time in the neighbourhood of the forts, and returning within their walls, at night, for protection; sometimes giving up the pursuit in despair, and retiring to the settled parts of the country; then returning to this country, and again abandoning it. We sometimes meet with a few men hardy enough to attempt the cultivation of their lands, associating implements of husbandry, with the instruments of war, the character of the husbandman, with that of a soldier; and yet I do not recollect any instance, where, with this enterprising, daring spirit, a single individual was enabled to make such a settlement as the law required. You have heard what exertions were made by the *Holland* company, you will consider what was the state of that country during the period in question, you will apply the principles laid down by the Court to the evidence in the cause, and then say, whether the title is with the plaintiff or not. 1805.

Verdict for the plaintiff.

CIRCUIT COURT,

PENNSYLVANIA DISTRICT.

October Term 1805.

Present WASHINGTON, Associate Judge of the Supreme Court.
PETERS, District Judge.

Penn's Lessee *versus* Klyne.

BY an act of the General Assembly of *Pennsylvania*, passed on the 27th day of *November* 1779 (1 *vol. State Laws*, 622. *Dall. edit.*) the estates of the late proprietaries were vested in the commonwealth, subject to the following proviso:

"Sect. 8. *Provided also*, That all and every the private estates, lands and hereditaments, of any of the said proprietaries, whereof they are now possessed, or to which they are now entitled, in their private several right or capacity, by devise, purchase or descent; and likewise all the lands called and known by the name of the proprietary tenths or manors, which were duly surveyed, and returned into the Land-office, on or before the fourth day of *July*, in the year of our Lord one thousand seven hundred and seventy-six, together with the quit or other rents, and arrearages of rents, reserved out of the said proprietary tenths or manors, or any part or parts thereof, which have been sold, be confirmed, ratified and established for ever, according to such estate or estates therein, and under such limitations, uses and trusts, as in and by the several and respective reservations, grants and conveyances thereof, are directed and appointed."

The present suit, and a number of other ejectments, were brought for tracts of land, lying in *York* county; in all of which, the general question was, whether the land was included in a tract called and known by the name of a proprietary manor, duly surveyed

veyed and returned into the land-office, on or before the 4th day of *July* 1776? 1805.

The title of the lessor of the plaintiff to the premises in dispute, was regularly deduced from the charter of *Charles* the 2d to *William Penn*, (1) provided there was a manor called and known by the name of *Springetsbury*, duly surveyed and returned, according to the terms and meaning of the act of *November* 1779.

The material facts, upon the controverted point, were these: At the time that Sir *William Keith* was governor of the province, the controversy between the proprietor and Lord *Baltimore* had arisen; and many persons from *Maryland* intruded upon the adjacent lands in *Pennsylvania*. Under the pressure of these intrusions, Sir *William*, on the 18th of *June* 1722, issued a warrant to *John French*, *Francis Worley* and *James Mitchell*, in which he recited, "that the three nations of *Indians* on the north side of *Susquehanna* are much disturbed, and the peace of the colony in danger, by attempts to survey land on the south west bank of the river, over against the *Indian* towns and settlements, without any right, or pretence of authority, so to do, from the proprietor, unto whom the lands unquestionably belong; that it is agreeable to treaty and usage to reserve a sufficient quantity of land, on the south-west side of the *Susquehanna*, within the proprietor's land, for accommodating the said *Indians*: and that the *Indians* had requested, at a treaty, held on the 15th and 16th instant, that a large tract of land, right against their towns on *Susquehanna* might be surveyed for the proprietor's use only; because, from his bounty and goodness, they would always be sure to obtain whatsoever was necessary and convenient for them, from time to time." Sir *William's* warrant then proceeded, that "by virtue of the powers wherewith he is entrusted for the preservation of his majesty's peace in this province, and with a due respect and regard to the propietor's absolute title, and unquestionable rights, he directs and authorises, the persons named in the warrant, to cross and survey, mark and locate, 70,000 acres in the name and for the use of *Springet Penn* Esq., which shall bear the name, and be called the manor, of *Springetsbury*: beginning upon the south-west bank, over against *Conestogoe* creek; thence W. S. W. 10 miles; thence N. W. by N. 12 miles; thence E. N. E. to the uppermost corner of a tract called *Newberry;* thence S. E. by S. along the head line of *Newberry*, to the southern corner tree of *Newberry*; thence down the side line of *Newberry* E. N. E. to the *Susquehanna*; and thence down the river side to the place of beginning: And to return the warrant to the governor and council of *Pennsylvania*." The survey being executed on the 19th and 20th of *June*, was returned to the council, on the 21st of *June* 1722, according to the following boundaries: "From a red oak,

(1) The original charter was given in evidence upon the trial.

"by

1805. "by a run's side, called *Penn's* run, marked S. P. W. S. W. 10 "miles to a chesnut by a run's side called *French's* run, marked "S. P.; thence N. W. by N. to a black oak marked S. P. 12 "miles; thence E. N. E. to Sir *Wm. Keith's* western corner "tree in the woods 8 miles; thence along the S. E. and N. E. "lines of Sir *Wm. Keith's* tract called *Newberry* to the *Susque-* "*hanna*; and thence along the river side to the place of begin- "ning; containing 75,520 acres."

Sir *William Keith* having communicated these proceedings to the council, on the second of *July* 1722, it was thereupon declared, that "so far as they concerned, or touched, with "the proprietary affairs, they were not judged to lie before the "Board;" which acted as a council of state, and not as commissioners of property. Col. *French* (one of the surveyors who executed the warrant) then undertook to vindicate the conduct of Sir *Wm. Keith* to the council, stating that "the warrant specified "his true reasons; and that it was, under all circumstances, the "only effectual measure, for quieting the minds of the *Indians*, "and preserving the public peace." The warrant and survey, however, could not be returned into the land-office at that time; for, it was said, that the land-office continued shut from the death of *W. Penn* in 1718, until the arrival of *T. Penn* in 1732: nor does it appear, that they were ever filed in the land-office, at any subsequent period.

In order to resist the *Maryland* intrusions, encouragement was offered by Sir *W. Keith*, and accepted, by a number of *Germans*, for forming settlements on the tract, which had been thus surveyed; and in *October* 1736, *Thomas Penn* having purchased the *Indian* claim to the land, empowered *Samuel Blunston* to grant licences for 12,000 acres (which was sufficient to satisfy the rights of those who had settled, perhaps, fifty in number) within the tract of land "commonly called the manor of *Springetsbury*," under the invitations of the governor. But in addition to such settlers, not only the population of the tract in dispute, but of the neighbouring country, rapidly increased.

The controversy with *Maryland* was finally settled in the year 1762, at which time *James Hamilton* was governor of the province; and, on the 21st of *May* of that year, he issued a warrant of re-survey, in which it was set forth, "that in pursuance of the "primitive regulations, for laying out lands in the province, *W.* "*Penn* had issued a warrant, dated the 1st of *September* 1700, to "*Edward Pennington*, the surveyor general, to survey for the "proprietor, 500 acres of every township of 5000 acres; and, "generally, the proprietary one tenth of all lands laid out, and to "be laid out; that like warrants had been issued by the succes- "sive proprietaries to every succeeding surveyor general; that "the tracts surveyed, however, are far short of the due propor- "tions of the proprietary; *that, therefore, by order of the then* "*commissioners*

" *commissioners of property, and in virtue of the general warrant* 1805.
" *aforesaid to the then surveyor general, there was surveyed for*
" *the use of the proprietor on the 19th and 20th of June* 1722, a
" certain tract of land, situate on the west side of the river *Sus-*
" *quehanna*, then in the county of *Chester*, afterwards of *Lancas-*
" *ter*, and now of *York*, containing about 70,000 acres, called and
" now well known by the name of the manor of *Springetsbury*;
" that sundry *Germans* and others afterwards seated them-
" selves by leave of the proprietor on divers parts of the said
" manor, but confirmation of their titles was delayed on account
" of the *Indian* claim; that on the 11th of *October* 1736, the *In-*
" *dians* released their claim, when (on the 30th of *October* 1736)
" a licence was given to each settler (the whole grant computed
" at 12,000 acres) promising patents, after surveys should be
" made; that the survey of the said tract of land is either lost, or
" mislaid; but that from the well known settlements and im-
" provements made by the said licenced settlers therein, and the
" many surveys made round the said manor, and other proofs
" and circumstances, it appears that the said tract is bounded E.
" by the *Susquehanna*, W. by a north and south line west of the
" late dwelling plantation of *Christian Elstor*, called *Oyster*, a li-
" cenced settler, N. by a line nearly east and west distant
" about three miles north of the present great roads, leading from
" *Wright's* ferry through *York-Town* by the said *Christian Oys-*
" *ter's* plantation to *Monockassy*; S. by a line near east and
" west distant about three miles south of the great road aforesaid;
" that divers of the said tracts and settlements within the said
" manor, have been surveyed and confirmed by patents, and ma-
" ny that have been surveyed remain to be confirmed by patents,
" for which the settlers have applied; that the proprietor is de-
" sirous, that a complete draft, or map, and return of survey of
" the said manor shall be *replaced* and remain for their and his
" use, in the surveyor general's office, and also in the secre-
" tary's office; that by special order and direction a survey
" for the proprietor's use was made by *Thomas Cookson*, deputy
" surveyor (in 1741) of a tract on both sides of the *Codorus*,
" within the said manor, for the scite of a town, whereon *York-*
" *Town* has since been laid out and built, but no return of that
" survey being made, the premises were re-surveyed by *George*
" *Stevenson*, deputy surveyor (in *December* 1752) and found to
" contain 436½ acres." After this recital the warrant directed the surveyor general " to *re-survey* the said tract, for the proprietor's " use, as part of his one-tenth, in order that the bounds and lines " thereof may be certainly known and ascertained." On the 13th of *May* 1768, the governor's secretary, by letter, urged the surveyor general to make a survey and return of the outline of the manor at least; the survey was accordingly executed on the 12th and 30th of *June*; and the plat was returned into the land-office, and, also, into the secretary's office on the 12th of *July* 1768, containing

1805. containing 64,520 acres; a part of the original tract of 70,000 acres having been cut off, under the agreement between *Penn* and *Baltimore*, to satisfy the claims of *Maryland* settlers.

On the trial of the cause, evidence was given on each side, to maintain the opposite positions, respecting the existence or non-existence of the manor of *Springetsbury*, from public instruments; from the sense expressed by the proprietaries, before the revolution, in their warrants and patents; from the sense expressed by the warrants and patents issued since the revolution; from the practice of the land-office; and from the current of public opinion.

The general ground taken by the plaintiff's counsel (*E. Tilghman*, *Lewis*, and *Rawle*) was, 1st. That the land mentioned in the declaration is a part of a tract called, or known by the name of a proprietary manor. 2d. That it was a proprietary manor duly surveyed, within the true intent and meaning of the act of the general assembly. And, 3d. That the survey was duly made and returned before the 4th of *July* 1776.

The defendant's counsel (*M'Kean*, attorney general, *Hopkins* and *Dallas*) contended, 1st. That Sir *Wm. Keith's* warrant being issued in 1722, without authority, all proceedings on it were absolutely void; and that neither the warrant, nor survey, had ever been returned into the land-office. 2d. That governor *Hamilton's* warrant was issued in 1762, to *re-survey* a manor, which had never been legally *surveyed*, and was, in that respect, to be regarded as a superstructure without a foundation. 3d. That the recitals of governor *Hamilton's* warrant are not founded in fact; and that considering the survey, in pursuance of it, as an original survey, it was void, as against compact, law, and justice, that the proprietor should assume for a manor, land, that had been previously located and settled by individuals.

The following charge was delivered to the jury:

WASHINGTON, *Justice*. In this cause there are two questions, 1st. Have the lessors of the plaintiffs a title to the land in question. If they have, 2d. Has the defendant a better right?

1st. The lessors of the plaintiffs, or those under whom they claim, were once the sole owners and proprietaries, not only of the government, but of the soil, of *Pennsylvania*, not in a political, but in their private and individual capacities; not as trustees for the people, as to the whole, or any part of the soil, but in absolute fee simple, for their individual uses, and this right was no otherwise defined, by concessions on agreements, by *William Penn*, or his descendants, than to render them trustees for such individuals, as should acquire equitable rights, to particular portions of land, under general or special promises, rules and regulations, which they may, from time to time, have entered into and established.

Their

Their right to appropriate lands to their own use, was not derived from, or founded upon, any such rules or concessions, but flowed from their original chartered rights, which bestowed upon them the whole of the soil. But as it was their interest to encourage the population and settlement of the province, they erected an office, and laid down certain rules for its government, and the government of those who might wish to acquire rights to the unappropriated lands in the province, reserving to themselves a right to appropriate one tenth of the whole to themselves, for their private and individual uses. From hence the following principles resulted: that all persons, complying with the terms thus held out, acquired a right to the proportion of land, thus appropriated, not only against other individuals, who might thereafter attempt to appropriate the same land, but even against the proprietor himself, unless he had previously, and by some act of notoriety, evidenced his intention to withdraw such land from the general mass of property, and to appropriate it to his individual use. As a necessary consequence of this principle, whenever such was his intention, or was made known by a warrant of appropriation and a survey, to make out, and locate the ground thus withdrawn, this was notice to all the world, that no right to the land, thus laid off for the proprietaries, could be acquired by individuals, without a special agreement with the proprietaries, which might, or might not, be upon the common terms, as the proprietors might choose. But if before such special appropriation by the proprietaries, an individual had, in compliance with the office rules, appropriated a tract, within the bounds of the tract thus laid off for the proprietaries, such prior appropriation, would no otherwise affect the rights of the proprietaries, than in relation to the particular tracts thus claimed. His right to the residue, remained unaffected. On this ground the right of the first proprietor stood at the time of his death, and so continued to exist, in his legal representatives, until the year A. D. 1779, when a law of this state was passed, divesting the proprietaries of all their estate, right and title, in, or to, the soil of *Pennsylvania*, and vesting the same in the Commonwealth. But in this law, certain portions of land, within the Commonwealth are excepted, and the right of the proprietaries, to such portions, is confirmed and established forever. The lessors of the plaintiffs, who most undoubtedly are entitled to all the rights of the proprietaries, are compelled to date their title, from this law; and therefore it is necessary for them to show, that the land in question, is part of a tract of land, called and known by the name of a proprietary-tenth or manor; which was duly surveyed, and returned into the land-office, on or before the 4th of *July* 1776. 1805.

They are to prove, 1st, that this was in 1779 called and known by the name of a proprietary-tenth or manor. The words of the law are peculiar. As to their private rights, they must be such whereof

1805. whereof they were in 1779 possessed, or to which they were entitled. But as to the tenths or manors, it was sufficient if they were known by that name, and had been surveyed and returned, before the 4th of *July* 1776. These expressions respecting the manors, were rendered necessary, to avoid giving the word manor a technical meaning; for there were no manors, in a legal acceptation of the word, in this state, but there were many tracts of land appropriated to the separate use of the proprietaries, to which this name had been given. The first inquiry therefore, under this head, is, was the land in question part of a tract of land called, and known as a manor, in the year 1776 or 1779? To prove this fact, the licences granted by *Thomas Penn*, in 1736, to about 30 settlers, in different parts of the first, as well as second, survey, in which this is called the manor of *Springetsbury*, is strongly relied upon, to show, that, even at that early period, it had acquired this name: The tenor of the warrants afterwards granted for lands within this manor, varying from the terms of the common warrants, and this variance proved by witnesses, as marking this for manor land: The testimony of witnesses to show that the west line of this manor was always reputed to go considerably beyond *York* to *Oyster's*. The practice of surveyors and public officers, whenever warrants were issued to survey lands in the manor. But even if this tract of land had never acquired the name of a manor, prior to 1768, the survey made of it in that year, as a manor, is conclusive. From that period it acquired, by matter of record, the name of a manor; and so it appears, by the evidence in the cause, it was called and known.

2d. Was it duly surveyed and returned into the land office before the 4th of *July* 1776? That it was surveyed in 1768, is admitted; but, it is contended, that it was not duly surveyed. It is so contended, because it was surveyed in 1722. That survey it is said, was void, because made without authority, was not executed by the surveyor general, and was returned into the council of state's office. That survey then being void, it is said, vitiates the survey of 1768: the former being considered as the foundation, and the latter as the superstructure. The survey of 1768 is executed, it is argued, under a warrant of re-survey in 1762, and consequently the repetition of an act which has no validity, cannot give it validity. It is further argued, that the recital of the loss of the survey of 1722, is a mere pretence, a fraud, to enable the proprietaries to exchange bad land for good. Now I do not understand this kind of logic: it is far too refined for the sober judgment of men who have to decide. If the invalidity of the first survey can have any effect upon the second, I should suppose it would establish it beyond all doubt; because, if the first survey was good, and if the warrant of 1762 was merely an order to retrace the lines of that survey, the counsel might, with some plausibility at least, argue that the surveyor was bound to pursue the lines of the

the lines of the former survey; and this would give colour to his observations, founded on the mistake of the public officers, as to the proper lines of the survey. But if the first survey was unauthorized, and utterly void, then the second could not, in the nature of things, be a resurvey. Whatever words were used in the warrant, there is no magic in that word. If there never was a former survey, there could be no resurvey; and consequently the survey, of 1768, was an original survey, founded on a special warrant, marking out the lines and bounds, by which the surveyor was to go, and such is the fact in this case, although the survey of 1722, is referred to in the warrant of 1762, yet the lines to be surveyed under this second warrant, are specially described. To those he was confined, and had he departed from them, the survey would, unless it was rectified by acceptance, have been void, as against the proprietary, and he might have directed it to be made again. It is not denied, but that the survey of 1768, is in conformity with the warrant. It was accepted as a valid survey, and I cannot see upon what ground the defendants, or any other person, can now say, that it was void. Had not the proprietary a right to appropriate to his private use, the land included within the survey of 1768, in part of the tenth, which he had always reserved to himself? And if the warrant and survey makes the appropriation, what does it signify, whether there was a prior survey or not? or whether it was good or bad? True, if previously to the warrant of 1762, third persons had acquired a right to parcels of this land, or had done so afterwards, and before the survey in 1768, (but without notice of the warrants,) the proprietaries would have been bound to make them titles, upon their complying with the terms of the grants to them. But this could not impeach his title to the residue of the land, comprehended within the lines of the survey. Upon the whole then, the court is of opinion, that this manor was duly surveyed; and it is admitted, that the survey was returned into the land office, before the 4th of *July* 1776. If so, the plaintiffs' title is unquestionable. 1805.

2d. Has the defendant a better title? He claims by warrant, in 1747, regularly brought down to him, for 95 acres. He has no patent, but yet by the common law of this state, a warrant and survey, if the consideration be paid, is considered a legal title against the proprietary, as much so as if he had a patent. If the consideration be not paid, then the legal title is not out of the proprietaries; but still the warrant holder has an equitable title, which it is in his power to render a legal one, by paying what is due to the proprietaries. No proof is given of payment by the defendant, or any one of those under whom he claims, but you are called upon to presume it from length of time. Now in a case of this sort, there is no room for presumption, the very circumstance of the defendant appearing in court without a patent, or without shewing, or pretending, that any ever was granted, destroys the

 presumption,

1805. presumption, which length of time might have created. For if he had paid, he would have been entitled that moment to a patent: the one was the necessary consequence of the other. Men might long forbear to call for this confirmation of their titles, from the inconvenience of paying the consideration, but that he should pay, and not go on to perfect his title, is altogether improbable, and certainly not to be presumed; but if the jury could presume any thing from length of time, yet that presumption may be repelled, and in this case is.

The deed of 1771, from *Pence*, the grantee, to *Shultz*, proved that he had not paid, and the deed from *Shultz*'s executors to *Stump*, in 1794, that it was not then paid. The defendant, therefore, has not a legal title to authorize a verdict in his favour; but he has an equitable title, and may compel a grant, upon paying, or tendering, what is due to the plaintiffs, with costs of this suit. And if the plaintiffs should then refuse, this court sitting in equity, would compel them, at the expence of paying costs. In the state court, I understand, the jury may make a kind of special or conditional finding, in consequence of the having no court of equity. But this court having equitable jurisdiction, your verdict must be general.

Verdict for the Plaintiffs. (1)

Guppy *et al. versus* Brown.

A COMMISSION had issued to four commissioners, jointly, to take the depositions of witnesses in *England*. It was executed and returned by three of the commissioners only, two of whom, however, were of the defendant's nomination.

At the trial of the cause, the defendant's counsel objected to the reading of the depositions; and cited 1 *Bac. Abr.* 202. 2 *Inst.*

The plaintiffs' counsel observed, that the commission had not issued in the usual form; but insisted that as the defendant's

(1) As some of the persons, interested in the ejectments brought for lands in *Springetsbury* manor, had purchased from the state; and as the state would be entitled to all arrears of purchase money, if the proprietary title should not be established; the legislature had authorised the governor to employ counsel to assist the counsel of the defendants. After the decision of the above case, the legislature appointed *James Ross* and *James Hopkins*, Esqrs. to take defence in the next ejectment, *Penn's lessee* v. *Groff*, which was tried in *April* term 1806; and upon the same charge, the same verdict was given. The defendant's counsel, having tendered a bill of exceptions, to the charge of the court, arrangements were made to obtain a final decision in the Supreme Court, upon a writ of error. It appears, however, from the journals, that the legislature is not disposed to interfere any further; and, I have been informed, that terms of compromise have been proposed, and accepted, by the parties.

commissioners

commissioners had attended, the objection could not be maintained on his part. 1805.

By the COURT: The objection is fatal. The commissioners do not derive their authority from the parties, but from the Court; and as it is a special authority, it must be strictly pursued. The power given to four, cannot be well executed by three, commissioners.

The evidence over-ruled.

Ingersoll, and *Tod*, for the plaintiffs.
Franklin, and *Dallas*, for the defendant.

CIRCUIT COURT,

PENNSYLVANIA DISTRICT.

April Term 1806.

Present WASHINGTON, an Associate Judge of the Supreme Court.
PETERS, District Judge.

The United States *versus* Richard Johns.

THIS was a prosecution, on the 2d section of the act of congress, of the 26th of *March* 1804, (7 *vol.* 126.) which is expressed in these words: "*Be it further enacted*, That if any "person shall, on the high seas, wilfully and corruptly cast away, "burn, or otherwise destroy, any ship or vessel of which he is "owner, in part or in whole, or in anywise direct or procure the "same to be done, with intent or design to prejudice any person "or persons that hath underwritten, or shall underwrite, any "policy or policies of insurance thereon, or if any merchant or "merchants that shall load goods thereon, or of any other owner "or owners of such ship or vessel, the person or persons offend-"ing therein, being thereof lawfully convicted, shall be deemed "and adjudged guilty of felony, and shall suffer death."(1)

In the course of the prosecution and trial, the following points occurred.

I. The defendant was brought, by *habeas corpus*, before the Court, holding an adjourned session, on the 8th of *January* 1806, when it appeared that, on the 27th of *December* 1805, he

(1) The second member of the section is so inaccurately expressed, that the attorney of the district thought, at first, there must have been some error of the press; but the secretary of state informed him, that the printed copy was found, upon a comparison, to agree exactly with the roll. See the analogous *English* statutes, 4 *Geo.* 1. *c.* 12. *s.* 3. 11 *Geo.* 1. *c.* 29.

had

had been committed by the mayor of the city of *Philadelphia*, 1806.
"charged on the oath of *Andrew Clarke* with having on the 20th
"day of *August* last, or thereabouts, on the high seas, scuttled
"the schooner *Enterprize* of *Baltimore*, with intention to defraud
"the underwriters, as he believes."

The prisoner's counsel objected, 1st. That the commitment was vague, and did not describe the offence, within the words of the act of Congress. 2d. That the offence was not committed within the district of *Pennsylvania*; and no demand having been made for his surrender by the executive of any other state, there was no law to warrant his arrest, or detention. 3d. That the evidence was not sufficiently strong, to found an indictment against him and he was entitled, at all events, to be discharged on bail.

It was answered, by the attorney of the district, 1st. That whatever might be the formal defects of the original commitment, the Court, being now satisfied with the evidence, would remand the prisoner for trial. 2d. That it was not necessary, for that purpose, to give positive proof of guilt; but to show probable cause for the accusation. 3d. That the case did not come, at all, under the constitutional, or legislative, provisions, for the surrender of a fugitive from the justice of another state; but it was the case of a crime against the *United States*, committed on the high seas; when the trial is directed to be in the district, where the offender is apprehended. 1 *vol.* 103. *s.* 8. 1 *vol.* 72, 3. *s.* 33.

By the COURT: Upon a *habeas corpus*, we are only to inquire, whether the warrant of commitment states a sufficient probable cause to believe, that the person charged, has committed the offence stated. We have heard the evidence; and cannot doubt of its sufficiency to that extent. We do not think, that the prisoner ought either to be discharged, or bailed. He must be remanded for trial.

II. When the panel of jurors was called over, the prisoner's counsel claimed the right of challenging thirty-five jurors peremptorily, as the offence, charged in the indictment, had been created, since the act of the 30th of *April* 1790 (1 *vol.* 113. *s.* 30.) and the right of challenge remained as at common law. 4 *Hawk.* 389. 4 *Bl. C.* . The clause, respecting challenges is in these words: "If any person, or persons be indicted of treason against "the *United States*, and shall stand mute, or refuse to plead, or "shall challenge peremptorily above the number of thirty-five of "the jury; or if any other person, or persons, be indicted of any other "of the offences *hereinbefore set forth*, for which the punishment "is declared to be death, if he or they shall so stand mute, or "will not answer to the indictment, or challenge peremptorily "above the number of twenty persons of the jury; the Court, in "any of the cases aforesaid, shall notwithstanding proceed to the "trial

1806. "trial of the person or persons so standing mute, or challenging, "as if he or they had pleaded not guilty, and render judgment "thereon accordingly."

The attorney of the district, said he was indifferent which way the Court decided the point; but it was proper to remark, that the 29th section of the judicial act referred, generally, to the state law, for the rule relating to juries; (1 *vol.* 67.) that the state law limited the right of peremptory challenge, in cases like the present, to the number of twenty; that the 30th section of the penal act (1 *vol.* 113.) obviously considers the whole law of peremptory challenge provided for, in future, as well as existing, capital cases; and that it was improper to refer to a common law rule, if a rule was prescribed by statute.

PETERS, *Justice.* The words of the penal act, when they restrain the common law right of peremptory challenge, also expressly confine the operation of the restraint, to the offences before set forth in the act. For offences not set forth in the act, the only rule is furnished by the common law; and it is the privilege of the prisoner, that it should be applied and enforced.

WASHINGTON, *Justice.* The right of challenge was a privilege highly esteemed, and anxiously guarded, at the common law; and it cannot be doubted, but that at the common law, a prisoner is entitled, on a capital charge, to challenge peremptorily, thirty-five of the jurors. If, therefore, the act of congress has substituted no other rule (and, in the present instance, it is clear that none has been substituted) the common law rule must be pursued.

It is not easy, indeed, to assign a reason, for introducing the words, that confine the provision, respecting peremptory challenges, to offences *before set forth* in the act; but it is enough to bind our judgments, that the words are actually introduced. (2)

III. The indictment contained four counts: 1st *Count.* That the prisoner being owner, in whole, of a certain ship, or vessel called the *Enterprize* of *Baltimore*, "the *Baltimore* Insurance Compa-"ny, by their president, and under their corporate seal attested "by their secretary did subscribe and underwrite a certain policy "of insurance upon the said ship, or vessel, called the *Enterprize* "in the sum of 2700 dollars upon a certain voyage &c. And the "said *Richard Johns* well knowing the premises with intent and "design wilfully, corruptly, unlawfully and feloniously to preju-"dice the said *Baltimore* Insurance Company &c. and by means

(2) In the case of the *United States* v. *Russel*, on an indictment for murder on the high seas, tried at *October* term 1806, the prisoner's counsel, at first, claimed the right of peremptorily challenging thirty-five jurors; but, that being an offence set forth in the penal law, was expressly embraced by the provision limiting the peremptory challenges to twenty; and the claim was, accordingly, over-ruled.

"of

" of the aforesaid insurance unjustly to acquire to himself unlaw- 1806.
" ful and corrupt gain and advantage on the &c. with force and
" arms on the high seas &c. wilfully corruptly unlawfully and
" feloniously did cast away and destroy the said ship or vessel
" called the *Enterprize* in and upon the voyage in the said policy
" of insurance mentioned &c. to the great damage of the said
" *Baltimore* Insurance Company, against the form of the act of the
" congress of the *United States* &c." *2d Count.* That he committed the felony, by feloniously boring auger holes through the bottom of the vessel. *3d Count.* That he feloniously directed and procured the vessel to be cast away and destroyed. *4th Count.* That he feloniously directed and procured the vessel to be cast away and destroyed, by feloniously boring auger holes through the bottom of the vessel.

1st. The president of the *Baltimore* Insurance Company was offered as a witness, to prove the order for insurance, and the subscription to the policy. The prisoner's counsel objected to his competency; and cited 1 *P. Wms.* 595. 1 *M'Nall.* 52, 3. But the objection was over-ruled.

2d. A copy of the manifest of the outward cargo of the *Experiment*, certified under the hands and seal of the custom-house officers of *Baltimore*, was offered in evidence, after proof by the witness, that he had himself compared it with the record. The prisoner's counsel objected, that there was no evidence, that the original manifest was subscribed by the prisoner, or even delivered by him. The district attorney answered, that by the 21st section of the impost law (4 *vol.* 311, 312.) it was made the duty of the collector of the port, "to record, in books to be kept for that purpose, all manifests;" and that, being a record, the proof offered was unexceptionable.

By the COURT: In that point of view, the evidence is clearly admissible.

3d. The policy of insurance, under the corporate seal of the company, signed by the president and attested by the secretary, was offered in evidence. The prisoner's counsel objected, that the charter of incorporation must be produced, before any corporate act, or instrument, could be given in evidence. The attorney of the district opposed the objection, on account of the difficulty, which the precedent would create in future prosecutions: but the COURT deeming it necessary to establish the corporate capacity of the Insurance Company, he read the acts of the legislature of *Maryland* on that subject, from the statute book, published by authority; and these being limited in their duration, he offered an exemplification of a recent act, protracting the existence of the corporation at, and beyond, the time of subscribing the policy in question.

1806. question. The exemplification, however, was under the great seal of *Maryland*, but was not attested by the governor, or any other principal officer, of the state. The prisoner's counsel objected to the want of such attestation; but the objection was overruled.

By the COURT: The act of congress declares, "that the acts of "the legislatures of the several states shall be authenticated, by having the seal of their respective states affixed thereto." 1 *vol.* 115. It does not require the attestation of any public officer in this case; although in all the cases afterwards provided for, such an attestation is required. There is a good reason for the distinction. The seal is in itself, the highest test of authenticity; and leaving the evidence upon that alone, precludes all controversy, as to the officer entitled to affix the seal, which is a regulation very different in the different states.

4th. On the evidence in the cause, various grounds of defence were adopted by the prisoner's counsel, *Lewis*, *Rawle*, *S. Levy*, *S. Ewing*, and *C. Ingersoll*, and controverted by *Dallas*, attorney of the district, of which the principal were these: 1st. That the second section of the act of congress does not expressly authorise an indictment against an *American* citizen; and it would be an usurpation of legislative power, to extend its operation to aliens, committing offences on the high seas. 2d. That the act does not expressly embrace the case of an insurance by a corporation; and a corporation is not included in the description of *persons*. 3d. That the indictment describes the *Experiment* to be *a ship or vessel*, which is not sufficiently specific. 4th. That in fact, and in law, the vessel was not cast away and destroyed. 5th. That if the vessel were feloniously destroyed, the evidence does not prove the prisoner to be the felon. (3)

The COURT, in the charge to the jury, having reviewed and commented upon the facts, observed, that the objections, in point of law, would appear on the record, and might be taken advantage of, upon a motion in arrest of judgment. On the law, therefore, the COURT avoided giving any opinion at present, except in relation to the question,—what constituted the destruction of a ship, or vessel, within the meaning of the act of congress? On this question, they had deliberated much; and, as the result, reduced to writing an opinion, which they delivered, in charge to

(3) In the course of the defence, the following authorities were cited: 2 *East, P. C.* 1097, 8. *Johnson's Dict.* "*Cast-away.*" 8 *Mod.* 67. *ca.* 48. *Ib.* 74. *ca.* 52. 4 *Hawk.* 67. 62. 2 *Burr.* 1037. *Plowd.* 177. 1 *Leach*, 215. *Rex* v. *Harrison.* 2 *Stra.* 1241. 8 *Mod.* 66. 1 *Hale*, 635. 2 *Hale*, 389. 3 *Inst.* 202. 4 *Bl. C.* 88. *Leach*, 109. *Con. Interp.* 2 *Hawk. c.* 25. *s.* 58, 59. *Ib. c.* 23. *s.* 82. 2 *Rol. Abr.* 30. 5 *Mod.* 137, 8. The attorney of the district cited 1 *Leach*, 215. 1 *Bl. C.* 467. 2 *Inst.* 702. 1 *Wooddes.* 195.

the

the jury, in these words: "To *destroy* a vessel, is to unfit her "for service, beyond the hopes of recovery, by ordinary means. "This, in extent of injury, is synonymous with *cast away*. It is "the generical term: *casting away* is a species of *destroying*, as "*burning* is. Both mean such an act, as causes a vessel to perish, "or be lost, so as to be irrecoverable by ordinary means." 1806.

The defendant was acquitted, owing, it is believed, to a doubt, whether he had bored himself, or directed any other person to bore, the auger holes in the bottom of the vessel; which was a new vessel, picked up at sea, after she was abandoned, carried into *St. Jago de Cuba*, and there (the holes being discovered) soon repaired, and fitted again for sea.

Symonds *versus* The Union Insurance Company.

THE plaintiff had effected, at the office of the defendants, three policies of insurance, dated the 12th of *September* 1803. The first on the schooner *Diana*, *Nicholas* master, valued at 4500 dollars; the second on the freight of the schooner, valued at 1500 dollars, and the third on her cargo, valued at 4000 dollars; on a voyage, "at and from *New-York* to *Cape François* with liberty to "proceed to another port, should *Cape François* be blockaded, and "the vessel prevented entering that port, from that, or any other, "cause, and at and from thence back to *New-York*." The order for the insurance, declared "that the assured is not to abandon, "if she cannot enter the *Cape* from blockade or other cause, but "liberty is given to proceed to some other port."

The schooner sailed from *New-York*, on the 19th of *September* 1803, with instructions "to proceed to *Cape François;* and, if she "could not enter, from blockade or other cause, to steer towards "the Bite of *Leogane*, and enter either into *Port-au-Prince*, or "some other port in the bite." On the 8th of *October*, she was boarded, off the island of *St. Domingo*, by an officer from the *Blanche*, a *British* frigate, who sent her papers on board the *Bellerophon*, another *British* ship of war. On the next day capt. *Nicholas* was taken on board the *Bellerophon*, and was informed, "that the "island of *St. Domingo* was blockaded by an *English* squadron, "in consequence of which no vessel would be permitted to enter "any port or harbour, in the said island;" and, to that effect, the register and papers of the schooner were indorsed. It appeared, also, from the captain's testimony, "that he was told he was not "permitted to proceed on his intended voyage, nor to go to *Cuba;* "but should proceed down to *Kingston*, *Jamaica;* that he was "ordered to keep near the frigate *Desire*, until they had cleared "the island of *St. Domingo;* that on his arrival at *Kingston*, he "was, also, told by the custom-house officers, that he could not

1806. "clear out for *Cuba*, whither he was still desirous of going; and "that, finally, the cargo was landed and sold at *Kingston*." The proceeds were then vested in another cargo, with which the ship returned to *New-York*. On her arrival there, about the 17th of *December* 1803, the plaintiff abandoned the cargo and freight to the defendants, and claimed as for a total loss; to recover which (deducting the proceeds of the cargo, and accounting for the profits on the investment homeward) the present action was instituted.

On the trial of the cause these grounds of defence were taken: 1st. That upon the specific terms of the contract, the assured had not a right to abandon. The consequence of being turned aside by a blockading force was contemplated by the parties, but not insured against; for, the voyage insured was to the *Cape*, or to another *unblockaded* port of *Hispaniola*. The whole island being blockaded, another port must be sought at the risque of the assured; the conduct of the *British* being neither capture, nor arrest; but, simply, precaution, to prevent a breach of blockade. 2d. That on general principles, it is not a case of abandonment, for a total loss. The cargo was not prevented from arriving at its place of destination, by any risque insured against, acting upon the subject insured immediately, and not circuitously. There has been no capture, with a view to condemnation; no arrest, for the purpose of an embargo, in the service of a foreign prince; the cargo remains specifically the same; the ship has returned; wages have been paid, and of course freight has been earned; nothing, in short, has affected the voyage insured, but the act of preventing a breach of blockade, and the low state of the *Kingston* market; and for neither of these is the underwriter liable. 2 *Marsh.* 434. 2 *Burr.* 1198. 1 *T. Rep.* 187. 2 *Marsh.* 482. 2 *Burr.* 696. 3 *Atk.* 195. 2 *Stra.* 849. 2 *Marsh.* 496. *Doug.* 219. 1 *Esp. N. P. Rep.* 237. 3 *Bos. and Pull.* 388. 5 *Esp. N. P. Rep.* 50. *Mill.* 305, 6. 5 *East*, 388.

The answer, for the plaintiff, was, in general, that the voyage insured had been destroyed, by the superior force of a foreign power; and that, independent of the means taken to prevent a breach of the blockade, the vessel had been constrained, against the express desire of the captain, to proceed to a particular port, in exclusion of every other.

And the COURT, in the charge to the jury, declared the law to be clearly with the plaintiff; on which a verdict was found in his favour for the goods and freight, at the value insured, subject to a deduction of the proceeds of the homeward investment.

Rawle, for the plaintiff.
Dallas, for the defendant.

Conframp

1806.

Conframp *et al. versus* Bunel.

CAPIAS. On a rule to show cause, why the defendant should not be discharged on common bail, the following facts were established by the plaintiff: That in the year 1787, the defendant gave his note for 55,000 livres, to a person of the name of *Horguetand*, payable in two instalments, for *value received in 55 negroes.* On the 8th of *February* 1787, the note was assigned to the plaintiffs, and several partial payments were afterwards indorsed upon it. In *November* 1789, a suit was instituted at *Port-au-Prince*, to recover the balance; and a judgment, by default, was entered for 36,666 livres; to recover which was the object of the present action.

For the defendant it was shown, that all the parties to the contract were *French* subjects, resident in the island of *St. Domingo*, at the time the contract was made; that they continued *French* subjects at this time; that in *August* of the year 1793, the *French* commissioners (*Polverel* and *Santhorax*) had proclaimed, at *Port-au-Prince*, the abolition of slavery, and the freedom of the negroes; which the national convention ratified in the *February* ensuing; 4 *Edw. Hist. West Ind.* 146. 219. that, in consequence of this emancipation, the very negroes, who had been purchased by the defendant, had been taken from him; and that with a view to the calamitous situation of the colony, the following laws had been enacted by the *French* government:

1st. Extract from the law of the 6th of *September* 1802.

" Sect. 1. Until the 1st of *Vendemaire* 16th year all suits are sus-
" pended as well against the principal debtors as their securities for
" debts contracted prior to the 1st of *January* 1792, for the pur-
" chase of real property, or of negroes.

" Sect. 6. The creditors may however take all *conservatory*
" steps for the preservation of their rights, and even have the
" amount of their debts liquidated by judgments, but the *execu-*
" *tion* thereof shall be stayed according to the first section."

2d. Supplement to the above law, of the 12th of *April* 1803.

The preamble states that doubts have arisen, as to the construction of the 6th article; and the supplement declares,

" Sect. 1. That by the words " *conservatory steps*" (*actes con-*
" *servatoires*) are not to be understood any acts, which would
" prevent the effect of the suspensive clause of the law, such as
" attachments of property, levies on real or personal estate, oppo-
" sitions to the payment of rents, or other debts, &c.

" Sect. 2. Oppositions (in nature of attachments) made to
" the payment of *principal* sums due to the debtors, shall not pre-
" vent such payments, but the debtor shall be bound to make it
" appear

1806. "appear within six months, that he has employed those capitals, "in improving his *St. Domingo* plantation, otherwise he will not "be entitled to the benefit of the law."

Upon these premises, the defendant's counsel contended, 1st. That the contract of the parties was to be expounded and enforced, according to the laws of *France*. 1 *Bos. & Pull.* 138. 3 *Vez. jun.* 446. 4 *Vez. jun.* 577. 1 *Bl. Rep.* 258. 1 *H. Bl.* 665. 690. 4 *T. Rep.* 184. 2d. That upon the general principles of the *French* law, the defendant was not liable to be personally arrested on this contract, which does not constitute a commercial debt. 7 *Tit.* 1. *Art. Ord. of Com. p.* 386. 3d. That the right of action, to recover the debt, was expressly suspended by the law of the 6th of *September* 1802; and it was as irregular to commence the suit, before the suspension had run out, as it would be to obtain judgment and issue execution.

The plaintiff's counsel answered: 1st. That this was a commercial debt, within the terms of the authority cited, for which a personal arrest was authorised by the law of *France*. 2d. That the law of the 6th of *September* 1802, applies to original causes of action, and not to cases in which judgment had been previously rendered. 3d. That even where the *lex loci* governs the contract, it is the law of the country in which the suit is brought, that must furnish the form of the remedy. *Kaim's P. E.* 567, 8. 2 *Vern.* 540. 3 *Dall. Rep.* 373. 1 *Bos. & Pull.* 139, 140. 4th. That the utmost benefit, which the defendant can reasonably claim from the law of *September* 1802, is a stay of execution till the specified period has elapsed: but, in the mean time, the plaintiffs should be permitted to proceed to obtain judgment, and to secure the defendant's appearance eventually to answer it.

The COURT were clearly of opinion, that the parties were bound by the law of the 6th of *September* 1802; that the present case was within the law; and that the suspension of the law, applied as well to the commencement of the suit, as to the issuing of an execution.

The rule made absolute. (1)

Moylan, for the plaintiffs.
Du Ponceau, and *Dallas*, for the defendant.

(1) The defendant's counsel, proceeding on the grounds above stated, did not make, on this preliminary question, the objection, that the Circuit Court has no jurisdiction of a cause, in which both parties are aliens; an objection that has, repeatedly, been adjudged to be fatal.

1806.

Russel, for the use of Crucet, *versus* the Union Insurance Company.

COVENANT on an open policy, for 10,000 dollars, at a premium of 10 per cent. upon goods on board the ship *Hibberts*, on a voyage at and from the *Havanna* to *New-York*. The case was this: the ship *Hibberts* and her cargo, the property of *British* subjects, were captured by a *French* privateer, and carried into the *Havanna*. They were there claimed by Mr. *C. Frazier*, (an *English* merchant) on the recommendation of captain *Vansittart*, commanding a *British* frigate, for the *British* owners, and an order for restitution was granted by the *Spanish* government, on security being given, for the appraised value, (to wit, the ship 9655 dollars, and the cargo 22,400 dollars,) to abide the issue of an appeal, made by the captor, from the order of restitution. The captain had been removed at sea, at the time of the capture, and sent to the *United States;* but the first and second mates, who went in the ship to the *Havanna*, offered the security; which was given, at their instance, by Mr. *Felix Crucet* (a *Spaniard*, constituted their attorney) and the ship and cargo were thereupon delivered to him, on account of the original owners; but accompanied by a written declaration from Mr. *Frazier*, "that ship "and cargo were subject to *Crucet*'s orders until he shall be finally "indemnified, for his disbursements for costs of suit, outfits, com-"missions, &c. and be released from his security." *Crucet* having determined to send the ship and cargo to the *United States*, wrote two letters, dated, respectively, the 7th and 23d of *July* 1804, to his correspondent, *Henry Hill*, at *New-York*, in which, after representing the facts above stated, and ordering insurance, he proceeds in these words: "In my letter of the 7th inst. ordering "insurance on the ship *Hibberts* and cargo, I stated fully the "footing on which she was delivered to me, by the governor and "auditor of war, on security and mortgage; and she now pro-"ceeds to your address, with all the papers then mentioned on "board, besides the invoice, and bill of lading of the cargo. "From what are herewith inclosed, you will observe, that the "mortgage and security have been given for 22,410 dollars, value "of the cargo, and 9655 dollars, value of the ship *Hibberts*, to hold "that amount of stock, being 32,065 dollars, subject to the order of "the court here, until the appeal, entered to the supreme council of "war in *Madrid*, shall be decided. You will also observe, that "my account of advances for law costs, repairs, sails, rigging, "provisions, advance wages, &c. for the ship, in this port, amounts "to 6444 dollars 1¾ cents; my commission of guarantee, on giving "the security and mortgage, 5 per cent, on 32,065 dollars, is "1653 dollars 1 cent; and my commission for agency and trouble, "2½ per cent, 826 dollars 4 cents, makes total 8923 dollars 7¾ "cents,

1806. "cents, and that the last mentioned sum of 8923 dollars 74 cents, "must be paid to me here, and I must be entirely freed and re- "leased in this city, for the security and mortgage I have given "for the ship and cargo, before giving up any part of the proceeds "thereof. I have wrote to the concerned in *England*, apprizing "them of these circumstances, and that I shall give them due "advice, from time to time, of the progress of the appeal. You "will, I hope, exert yourself to dispose of the ship and cargo to "the best advantage, for the benefit of the concerned, sending the "account sales to me here, as soon as convenient, in order to be "transmitted to them in *England*."

The letter of instructions from *Crucet* to the captain of the *Hibberts*, directed him "to proceed direct to *New-York*, and there "deliver the letters, and other papers, to Mr. *Henry Hill*, jun.; "and, in his absence, to Mr. *Samuel Russel*, merchant there, to "whom the cargo is consigned. These gentlemen will, also, take "charge of the ship in *New-York*, and will furnish you with "money to pay off the officers and crew; and will pay you any "balance that may be due to yourself." And the invoice was headed, "Invoice of the cargo on board the ship *Hibberts*, of "*London*, *John Haines*, master, bound for *New York*, and con- "signed to Mr. *Henry Hill*, jun. merchant there, by *Felix* "*Crucet*, on account and risque of the owners, underwriters, or "others in *England*, or those who may be concerned in said ship "and cargo."

On the 13th of *August* 1804, *I. S. Waln*, for *Samuel Russel*, (the consignee appointed by *Crucet*, in case of *Hill*'s absence) effected the insurance, which is the ground of the present action. The ship sailed on the voyage insured; but was captured by the *Leander* off *Sandy Hook*, on the 16th of *August* 1804, and sent to *Halifax*, where she arrived on the 31st of *August*. The vessel and cargo were there libelled in the court of vice-admiralty as prize, and claimed by the captain for *Crucet:* but by the decree of the court, pronounced on the 10th of *October*, the claim was rejected, and the judge "pronounced the ship and cargo to be the property of "*British* subjects, re-captured by his majesty's ship of war "*Leander*, and decreed the said ship and her cargo to be restored "to the original *British* owners, on payment to the re-captors of "one-eighth part of the value thereof, and the claimant to pay "costs." (1) From this decree the claimant appealed; but the vessel and cargo were delivered, on security, to the agent of the original *British* owners, and sent by him to *England*.

When the ship was captured, it was notified to the defendants, who agreed to pay a just proportion of the expence of recovering

(1) In speaking of the decree of restitution, taking the property from the hands of a *Spaniard*, who had so fairly obtained a lien upon it, the court was reminded, that although war was declared between *Great Britain* and *France* on the 16th of *May* 1803, *Spain* did not become a party to it till the 11th *January* 1805.

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the property; but no actual abandonment, or offer to abandon, was made, until the 2d of *November*, when the decree of the vice-admiralty had been received by the plaintiff. 1806.

On the trial of the cause, the plaintiff's counsel read to the jury, the policy, the orders of *Crucet* and his agents for insurance, (which had been communicated to the defendants at the time of effecting the insurance) and the whole of the record of the proceedings in the court of vice-admiralty; but neither the original hypothecation to *Crucet*, nor the original bill of lading, nor the original invoice, nor any other proof of the special property of the plaintiff, in the ship and cargo was produced: and as soon as the plaintiff's counsel began to argue upon the papers found on board the ship, and spread upon the record, (to wit, the hypothecation, bill of lading, and invoice,) *as proof of property*, the opposite counsel objected, that although the whole record must be read, it was only evidence of the sentence of restitution.

The general defence was then placed on these grounds: 1st. That the abandonment was not made in due season; which, however, was an objection mentioned, but not strenuously urged. *Park.* 82. 81. *(a.)* 172. 1 *T. Rep.* 608. 2d. That the insurance was effected upon ship and goods, on account and risque of the original *British* owners, not on the special interest of *Crucet*, for his use and indemnity. *Park.* 267. 8. 1 *T. Rep.* 309. 3d. That the decree is conclusive to prove that the property was not in *Crucet;* and the restitution to the original owners, was restitution to him as their agent. 4th. That the statements of *Crucet* and his agents, to the underwriters, are not evidence of the facts contained in them upon the present trial; nor are the papers set forth in the record of the court of vice-admiralty, legal, or conceded, proofs of property.

For the plaintiff, it was contended, 1st. That his interest was of an insurable nature. 2d. That the nature of his interest was communicated to the defendants, at the time of effecting the insurance. 3d. That the loss of his possession, on the capture and restitution, was the loss of his lien, and, in its effect, total. 4th. That the record being read, without previous objection, or restriction, every part of it became evidence in itself; and the property of the plaintiff was proved by it. 5th. That, however, the question of property was a question of fact; and the papers on the record must, at least, be regarded, as corroborating the statements of the plaintiff and his agents, to prove his interest in the subject insured.

The charge of the court was delivered by the presiding judge, in substance as follows:

WASHINGTON, *Justice*. Though the case involves points of some novelty, and of considerable difficulty, we have so far satisfied our minds, that we will not request the jury, to reserve any thing

1806. thing for future consideration, although either party is at liberty to move for a new trial.

The first and principal difficulty is, whether *Crucet* has proved his interest in the subject insured, by proper evidence. The record of a court of admiralty is always evidence to prove a condemnation; but, certainly, in cases between the insurer and insured, it is only evidence, according to the general rule, to prove the cause of condemnation. On the present occasion, however, the record was read to the jury without opposition; and, on this ground alone, we decide it to be an exception to the rule. For, if the objection had been made, the plaintiff would have enjoyed an opportunity to supply the proof by other means.

The record is, therefore, considered as proof of facts, so far as it exhibits documents, which, if now produced, would be evidence in the cause. This still excludes, on the one hand, letters written by *Crucet;* while, on the other hand, it admits those papers, authenticated by other sources, that show the extent of his advances, the nature of his engagements, and the lien which he acquired upon the ship and cargo.

Upon the evidence, thus admitted, *Crucet* appears clearly to have acquired a contingent interest in the property; but it was, at first, a question of great doubt with us, whether it was an insurable interest. As to his actual advances of money, there could be no doubt, provided there was (as there is not) satisfactory evidence on that point, independent of what proceeds from himself. But to the right of insurance, the obligation of abandonment, in case of loss, would seem to be an inseparable incident; and we doubted, whether *Crucet* had any thing in the property, which he could abandon upon a loss, and, of course, which he was entitled to insure. On reflection, however, we conclude, that, upon an abandonment, the underwriters acquire all *Crucet*'s rights and remedies against the *British* owners: And, as to the manner of insuring his interest, it is clear, that a person having a lien upon a cargo, may cover it by an insurance on goods.

It is true, that the assured should communicate to the underwriter, the nature of his interest in the subject insured, though it need not be specified in the policy; and, on this ground, a question of fact arises, for the consideration of the jury. If the insurance of the special interest, and not of the principal ownership, made a material difference in the risque, or would have altered the amount of the premium; and the fact was not sufficiently disclosed to the defendants, the omission would vacate the policy.

After this view of the case, it only remains to inquire, whether a loss has happened, which entitles the plaintiff to recover? He has lost his posssession: and although we will not decide, whether the capture and sentence have destroyed his lien; we think, that as they have rendered it necessary to pursue the property, through

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an expensive, troublesome, and doubtful, medium; he has a right to consider the occurrence as a total loss, and to recover the amount of the insurance. 1806.

Verdict for the plaintiff. (1)

Ingersoll and *Rawle*, for the plaintiff.
E. Tilghman and *Dallas*, for the defendants.

(1) A motion was afterwards made for a new trial, on the single ground, that there was no proof of property in the plaintiff, except the ship's papers, spread upon the record of the court of vice-admiralty. An affidavit was filed, stating that Mr. *Ingersoll* had applied to Mr. *Dallas*, before the jury were sworn, to admit the record as proof of property, which was refused; and that the application of the record to that purpose (after it had been read) was opposed, as soon as it was attempted. But the motion was rejected, as Judge WASHINGTON adhered to the opinion delivered in the charge, and Judge PETERS said, that he had decided as well on that ground, as on the corroborative evidence, arising from the sameness of the documents found in the ship, and those described in the communications to the defendants, when the insurance was effected.

CIRCUIT COURT,

PENNSYLVANIA DISTRICT.

October Term 1806.

Present WASHINGTON, an Associate Judge of the Supreme Court.
PETERS, District Judge.

The United States *versus* James M'Gill.

THIS was an indictment for the murder of *Richard Budden*, containing three counts. 1st. Charging the murder to have been committed on the high seas. 2d. Charging it to have been committed in the haven of *Cape Francois*. 3d. Charging the mortal stroke to have been given on the high seas, and the death to have happened, on shore, at *Cape Francois*.

The indictment was founded on the 8th section of the penal law (1 *vol.* 102.) which provides "that if any person, or persons, "shall commit upon the high seas, or in any river, haven, bason, "or bay, out of the jurisdiction of any particular state, murder, "&c. every such offender shall be deemed, taken, and adjudged "to be a pirate and felon, and being thereof convicted, shall suf- "fer death."

Upon the evidence it appeared, that the prisoner was mate of the brig *Rover*, of which *Richard Budden*, the deceased, was master; that, on the 3d of *May* 1806, while the brig lay in the harbour of *Cape Francois*, the prisoner gave the deceased a mortal stroke, with a piece of wood; that the deceased, languishing with the wound, was taken on shore, alive, the next morning; and that he died the day subsequent to that, on which he was taken on shore.

After a defence on the merits, the prisoner's counsel (*Ingersoll* and *Joseph Reed*) objected, in point of law, that the death, as well

well as the mortal blow, were necessary to constitute murder; and that both the death and the blow must happen on the high seas, to give jurisdiction to this Court, under the terms of the act of congress. These positions were elaborately argued; and the following authorities were cited in support of them. 1 *Hale*, 425, 6. 4 *Co.* 42. 6. 2 *Hale*, 188. 3 *Hawk.* 188. 333. *Plowd.* 1 *Hale*, 427. *Leach C. L.* 723. 4 *Bl. C.* 303. 2 *Co. Rep.* 93. 2 *Inst.* 1 *Hawk.* 187. *East's C. L.* 365. 1 *Leon.* 270. *Cro. E.* 196. *Leach's C. L.* 432. 1806.

The attorney of the district premised, that he was aware of this objection to the jurisdiction; but, as there was no judicial decision upon it, he thought it a duty to bring it before the Court, for an authoritative opinion; and with that view alone, he meant to submit all the ideas which he could suggest, in maintainance of the jurisdiction. He then considered the case, 1st. On the constitution and laws of the *United States*, which provide for the definition and punishment of felonies and murders on the high seas; *Const. art.* 1. *s.* 8. 1 *vol.* 102. *s.* 8. which provide for the locality of the commission of the offence, to vest a federal jurisdiction; 1 *vol.* 101. *s.* 3. 8. which provide for the place and tribunal of trial; *Const. art.* 3. *s.* 2. 1 *vol.* 67. *s.* 29 *Ib.* 102. *s.* 8. *Ib.* 53. *s.* 9. *Ib.* 55. *s.* 11. which provide as to the manner of trial; *Const. art.* 3. *s.* 2. 1 *vol.* 67. *s.* 29. and which provide, generally, that the judicial power of the *United States* shall extend to all cases of admiralty and maritime jurisdiction. Thus, for every crime, whether of common law, or admiralty, jurisdiction, a common law trial is provided by jury, and a place of venue prescribed; but two things are to be remarked: 1st. That there is no definition of the offence of murder (for instance) with a reference to the common law, any more than to the civil law, which is the law of the admiralty. 2d. That locality, as to the commission of a crime, is no further limited, than as it respects the high seas, or is out of the jurisdiction of any particular state.

2d. On the law of *England*. The case would be within the constable and marshal's jurisdiction, at civil law, if the blow and death were both in a foreign country; or the blow in a foreign country, and the death in *England*: 13 *R. c.* 2. 2. 3 *Inst.* 48. 1 *Woodes.* 139. 4 *Bl. C.* 268. If the blow was on sea, and the death on land, neither the common law, nor the admiralty, have jurisdiction; nor is it a case under the statute of 28 *H.* 8. "for "the murder was not committed on the sea;" but the constable and marshal may try it, by 13 *R.* 2. Offences committed upon the seas, or in *other* haven, river or creek, are triable, by jury, in a county to be mentioned in a commission, issued under 27 *H.* 8. *c.* 4. 28 *H.* 8. *c.* 15. The 33 *H.* 8. *c.* 23. provides that "per-"sons, who have been examined before the king's council upon "treasons, murders, &c. may be tried in any shire to be named "in

1806. "in a commission," in whatever shire, or place, within the king's dominions, *or without*, such offence was committed. The 35 *H.* 8. *c.* 2. provides for the trial of *treasons*, committed out of the realm, by a jury, in the King's Bench, or before commissioners. The 11 & 12 *W.* 3. provides for the trial of offences in the colonies. The 2 *G.* 2. *c.* 21. provides for the trial of a murder where the mortal blow is given on the sea, or out of *England*, and the death happens in *England*; or where the blow is given in *England*, and the death happens abroad. Then, the only statute that provides for the case of the mortal blow and the death both happening abroad, is the 33 *H.* 8. *c.* 23., under the modification of a previous examination, &c. before the king's council: and in *England* the admiral's civil law jurisdiction, in criminal cases, is at an end.

3d. On the civil law. The judicial power of the *United States*, extending to all cases of admiralty and maritime jurisdiction, *ex vi termini*, embraces criminal, as well as civil, cases; and the civil law, being the law in such cases, it is to be considered, what the civil law defines to be murder, as to the act and the place. The intent, not the event, constitutes the crime. *Dig. ad Leg. Corn. l.* 14. *Dom.* 211. The crime is committed, if there be the will to commit it. *Ibid.* In *France*, where the criminal law is founded on the civil law, if a man strikes another, with intent to kill him, he is punished with death, though the man is not killed. 1 *Denizart.* 585. The doctrine of all the cases cited for the prisoner, which requires the stroke and the death to be in the same county, or within the same jurisdiction, is an incident to the common law trial by jury; where the jury of the vicinage are supposed to know the fact of their own knowledge; but it clearly has no application, in cases where the jury does not come at all from the place, where *any part* of the crime was committed. *Cessante ratione, cessat et ipsa lex.* The civil law being considered, therefore, as the law of the admiralty, remains under the general delegation of judicial power to the Courts of the *United States*, unless it is expressly modified by statute. So far as respects the definition of *murder*, it has not been modified; but the constitution and acts of congress do provide, that all crimes, wherever committed, shall be tried by jury; and that crimes committed on the high seas, shall be tried in the district where the offender is apprehended, or into which he may first be brought. 1 *vol. s.* 8. *p.* 102. (1) If, indeed, this reasoning fails,

(1) After the death of capt. *Budden*, *M'Gill* had been sent on board the *Mediator*, an armed vessel, there put in irons, and carried to *Baltimore*, from which place (without any arrest, or process issuing against him) he voluntarily came to *Philadelphia*; and surrendered himself for trial to a magistrate. The attorney of the district suggested, that, having been first brought into the district of *Maryland*, his trial must be there. But, after argument, Judge PETERS, decided, that the provisions of the act were in the alternative; and that *M'Gill*, being first apprehended in *Pennsylvania*, might be tried, and ought to be tried, here.

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it may be doubted, whether even congress can amend the law, so as to reach cases, like the one under consideration, notwithstanding the power "to define and punish piracies and felonies "committed on the high seas;" *Const. art.* 1. *s.* 8. since the crime of murder (adopting the common law definition) must be consummate, in the mortal act and consequence, within the jurisdiction of the *United States.* 1806.

PETERS, *Justice.* It is a general rule with me, to abstain from the exercise of jurisdiction, whenever I doubt my authority to exercise it. On the present occasion, it is not necessary to give an opinion, whether the present is a case of admiralty and maritime jurisdiction, upon the general principles of the admiralty and maritime law; for, confining myself to the 8th section of the penal act, I find sufficient to decide, that, at all events, it is not a case within the jurisdiction of this Court. The Court can only take cognizance of a murder committed on the high seas; and as murder consists in both the stroke and the consequent death, both parts of the crime must happen on the high seas to give jurisdiction; not one part on the high seas, and another part in a foreign country.

WASHINGTON, *Justice.* The point, principally, urged by the prisoner's counsel, is so clear, that it can receive little elucidation from argument. The offence, of which we have cognizance, is murder committed on the high seas. Now, murder is a technical term, of known and settled meaning; and, when used by the legislature, it imports the same, as if they had said, that the Court shall have jurisdiction, in a case of felonious killing upon the high seas. We have no doubt, therefore, that the death, as well as the mortal stroke, must happen on the high seas, to constitute a murder there.

But the more important question is, whether the present case, remains unprovided for, by the laws of the *United States*? The judicial act gives jurisdiction to the Circuit Court, of "all "crimes and offences, cognizable under the authority of the "*United States.*" 1 *vol.* 55. *s.* 11. There are, undoubtedly, in my opinion, many crimes and offences against the authority of the *United States*, which have not been specially defined by law; for, I have often decided, that the federal Courts have a common law jurisdiction in criminal cases: and in order to ascertain the authority of the *United States*, independent of acts of congress, against which crimes may be committed, we have been properly referred to the constitutional provision, that "the judi- "cial power shall extend to all cases of admiralty and maritime "jurisdiction." But still the question recurs, is this a case of admiralty and maritime jurisdiction, within the meaning of the constitution? The words of the constitution must be taken to refer

1806. refer to the admiralty and maritime jurisdiction of *England* (from whose code and practice, we derive our systems of jurisprudence, and, generally speaking, obtain the best glossary) but no case, no authority, has been produced to show, that in *England* such a prosecution would be sustained (independent of acts of parliament) as a cause of admiralty and maritime jurisdiction. Nor, am I disposed to consider the doctrine of the civil law, which has been mentioned, as furnishing a guide, to escape from the silence of our own code, as well as of the *English* code, upon the subject.

Upon the whole, therefore, I am of opinion, that the present is a case omitted in the law; and that the indictment cannot be sustained. It is some relief to my mind, however, that I have no doubt of the power of congress to provide for such a case. It is true, that it would be inconsistent with common law notions to call it murder; but congress, exercising the constitutional power to define *felonies* on the high seas, may certainly provide, that a mortal stroke on the high seas, wherever the death may happen, shall be adjudged to be a felony.

Upon this charge, the jury immediately acquitted the prisoner.

Snell *et al. versus* The Delaware Insurance Company.

COVENANT on an open policy, for 2500 dollars, at a premium of 10 per cent., upon the brig *Hound*, on a voyage from *Jamaica* to *New-York*. The facts were these: the brig and cargo, belonging to the plaintiffs, sailed on a voyage from *New-York* to *Curocoa*, and back again; but, upon the return voyage, she was captured by a *British* cruiser, and carried into *Jamaica*, where vessel and cargo were libelled and condemned, on the 31st of *July* 1804, for a breach of blockade. The captain, conceiving that the vessel would be sold under her value, requested Messrs. *Campbell* and *O'Harra*, of *Kingston*, to buy her in for the owners, which was accordingly done, at the price of 1020*l.*, equal to about 3,500 dollars. For the price of the vessel, amount of repairs, outfits, &c. (in the whole 1939*l.* 4*s.* 11*d.*) advanced by *Campbell* and *O'Harra*, those gentlemen took from the captain an hypothecation of the vessel, to guarantee the payment of a bill of exchange, which he drew upon the owners: and, on the 9th of *August* 1804, they requested Messrs. *Savage* and *Dugan* to procure insurance, upon the vessel for 5000 dollars; which was effected at the office of the Phœnix Insurance Company, upon the following instructions:

" Brig *Hound*, *Thomas W. Fuller* master, at and from *Jamaica* " to *New-York*. We expect she sailed on or about 16th ult. and " is represented as a fine coppered vessel: 5000 dollars.

" Said

"Said vessel was condemned at *Jamaica* and purchased for 1806.
"the former owners. This insurance was made to cover the sums
"advanced, whether the same be secured by a bottomry bond or
"conditional assignment or otherwise howsoever. Premium five
"per cent.

"Phœnix Insurance Company."

The owners of the vessel being advised of these proceedings, stated to *Savage* and *Dugan*, that the above insurance was not sufficient to cover her real value, and directed a further insurance for 2,500 dollars, which was effected by the present policy. The vessel sailed from *Jamaica* in *August* 1804; but was never heard of afterwards. At the expiration of a year, the Phœnix Insurance Company paid the amount of their subscription; but the defendants refused payment, on which this suit was instituted.

At the trial of the cause, the only disputed question was, whether the plaintiffs could go into evidence, to prove the actual value of the vessel insured; or were bound by the price, which was paid for her, under the condemnation, at *Jamaica*? On the first ground, the sums insured upon both policies, would be about the value; and, on the second ground, the amount received from the Phœnix Insurance Company, would be about sufficient to cover the loss. (1)

Dallas, for the plaintiffs, maintained the first ground, and cited, 2 *Marsh.* 529. 534, 535. *Park.* 282. 287. 1 *Emerig.* 263. *Val. art.* 8. *p.* 64. 56. 136. *Mill.* 247. 251. 264. 1 *Carnes*, 573. 2 *Carnes*, 20. 23.

Rawle and *Condy*, for the defendants, urged, that the plaintiffs had no right to insure more than the vessel cost them at *Jamaica*; that the Court ought not to direct the jury to inquire into the value there, beyond the cost; and that the plaintiffs, having recovered the original value from the underwriters, upon the voyage to *Curacoa*, had no right to resort to that criterion of value, on the present occasion.

But the COURT were clearly of opinion, that the plaintiffs were entitled to prove and to recover the actual value of the vessel, at the time she was insured. They said a contrary rule, would operate as injuriously to the underwriters, as to the merchant. For, if the merchant could not insure a ship, or goods, bought at a depreci-

(1) It appeared in evidence, that the vessel was built in 1802, when she cost 8,500 dollars; that when she sailed from *New-York*, in *May* 1804, she was worth between 7000 and 7,500 dollars; that she was insured on the voyage to *Curacoa*, in a valued policy, at 7000 dollars; and that she had been completely repaired at *Jamaica*.

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1806. ated price, under a forced sale, at their real value; neither would the underwriter, in a case of loss, be entitled to show, upon an open policy, the actual value of the property, independent of a fortuitous enhancement of the price, in a foreign market.

The jury found a verdict for the plaintiffs, for 2,378$\frac{33}{100}$ dollars, taking, it is presumed, the value in the outward policy, as the basis of their calculation.

SUPREME COURT

OF

PENNSYLVANIA.

December Term 1806.

Present TILGHMAN, Chief Justice.
SMITH, and
BRACKENRIDGE, } Justices.

Lyle *versus* Baker *et al.*

THIS action was instituted, in the Common Pleas of *Philadelphia* county, at *September* term 1806; and a *habeas corpus* was taken out by the defendants on the 1st of *December* following, to remove it into the Supreme Court. *Tod*, for the plaintiff, alleged that the *habeas corpus* had issued too late, and moved for a *procedendo*, on the 20th section of the act of the 24th of *February* 1806 (7 *vol.* 342.) which provides, "that no action "shall be removed from any of the Courts of Common Pleas, to "the Supreme, or Circuit Courts, by consent, or otherwise, un- "less the same is removed, on, or before, the first day of the "next term, after the said action shall have been commenced."

After argument in a full Court (but Judge YEATES being now absent, owing to indisposition) the *Chief Justice*, on the 17th of *January* 1807, delivered the following unanimous opinion.

TILGHMAN, *C. J.* The case turns entirely upon the construction of the 20th section of the act, "to alter the judiciary system "of this commonwealth." Where the intention of the legislature is clearly expressed, it must prevail, whatever may be the consequences. But, in the endeavour to discover the legislative intention, we must so construe the law, as not to reject any of its

1806. words; and if there appears to be a contradiction in the expressions, we must seek and pursue, upon the whole, the prevailing object and intent of the law. Viewing, then, all the parts of the section under consideration, I am of opinion, that an action may be removed to the Supreme Court, at any time before, or on, the first day of the term, succeeding that to which the original writ is returned. The expression, "first day of the next term after "the action shall have been commenced," taken by itself, would, certainly, limit the removal to the first day of the first term: but other expressions (I mean, particularly, the words, "*on or* "*before*") must, also, be considered; and they cannot be satisfied, if the right of removal is restricted to the first day of the first term. It is impossible to remove an action, *before* the first day of the term, to which the writ is returnable; as the writ of removal is directed to the Court, in which the action is brought, and the Court can have no knowledge of the action, until its session, at the term, next succeeding its commencement.

On this view of the subject, we are of opinion, that the intention of the legislature cannot be carried into effect, without so construing the act, as to admit of the removal of an action, on, or before, the first day of the term next after that, to which the original writ is returnable.

Procedendo refused.

Ozeas *versus* Johnson, Administrator of Foulke.

CASE for money had and received, &c. The plaintiff, and *Foulke*, the intestate, had been jointly concerned in a mercantile adventure from *Philadelphia* to *New-Orleans*; but there was no evidence, at the trial, that they had ever settled their accounts; and this action was brought to recover a balance claimed by the plaintiff. The jury, accordingly, gave a verdict, in his favour, for 320 dollars, subject to the opinion of the Court, on a point reserved; to wit, whether the plaintiff, being a partner of *Foulke's*, and equally concerned in the adventure, could recover in the present form of action?

On arguing the point reserved, *S. Levy*, for the plaintiff, urged that the action of account render was almost obsolete; that the action for money had and received, was in nature of a bill in equity; that, having no distinct Court of equity, equity had become, in effect, a part of the common law of *Pennsylvania*, administered through her common law Courts; and that the sense of the legislature, on the subject, was manifested in the 6th section of the act of the 1st of *March* 1806 (*7 vol. p.* 362.) which provides, "that in all cases where any suit has been brought in "any Court of record within this commonwealth, the same shall "not

"not be set aside for informality, if it appear, that the process "has issued in the name of the commonwealth, against the de- "fendant, for monies owing, or due, &c." *Wats. on Part.* 221. 2 *Vez.* 239. 1 *Bac. Abr.* 31. 36, 37. *Cowp.* 795. 1 *Dall. Rep.* 428. 211. 1806.

Hopkinson, for the defendant, admitted, that if a partnership is dissolved, and the partnership accounts settled, the creditor partner may bring an action on the case for the balance: *Wats. on Part.* 221. 226. but he contended, that as this was the case of a special partnership, in which no account of the joint adventure had been settled, an action of *assumpsit* could not be sustained. *Wats.* 116. 2 *T. Rep.* 476. 478, 479. 483. 2 *Caines*, 293. 296. *Lamerlen* v. *Caze, in the Circuit Court of the United States, April T.* 1806.

The opinion of the Court was delivered by the *Chief Justice*, on the 1st of *January* 1807, who, having stated the facts and point reserved, proceeded as follows:

TILGHMAN, *C. J.* It was my wish to support the action, if possible; because the jury have decided on the merits of the cause. But, upon a deliberate consideration of the nature of the action, and the authorities which have been cited, I am convinced that the plaintiff cannot recover. Money received by one partner, during the partnership, is not received for the use of either, but for the use of both, the partners. All that either partner is entitled to, is a moiety of what remains, after all the partnership debts are paid; and the proper remedy for one partner against the other, to obtain a settlement and payment, is an action of account render. In short, no case has been cited by the plaintiff's counsel, to show that an action, like the present, can be maintained, unless the partners have settled their account, and struck the balance.

It is, then, of importance to the administration of justice, that the forms of action, which originate in good sense, and public convenience, should not be confounded. The defendant has a right and an interest, to insist upon the preservation of the proper form of action, to enforce his partnership contract against him, of which this Court possesses no power to deprive him. It is, indeed, most convenient, that partnership accounts should be settled before auditors. It would often be extremely difficult, sometimes it would be impracticable, to settle them by a jury.

For these reasons, we think, that plaintiff cannot maintain the present action.

Bender

1806.

Bender *versus* Fromberger.

COVENANT. On the trial of the cause in *March* T. 1806, it appeared, that the defendant and his wife had sold and conveyed a tract of land to the plaintiff for 2390 dollars, by deed dated the 8th of *September* 1797; and had therein covenanted, "that the defendant was lawfully seised of a good, sure and in-"defeasible estate of inheritance, in fee simple, in the said land, and "had good right, full power, and authority, in his own right, to "grant and convey the same to the plaintiff in fee." The deed, also, contained a special warranty against the grantor and his heirs, and all persons claiming under them. *Bender* took possession of the premises and made considerable improvements, as well in fences and buildings, as in the cultivation of the soil; so that the property was valued, in *May* 1802, at 5000 dollars. An ejectment was brought, however, at the suit of *Benjamin Hilton* against *Bender*, in the Circuit Court of the *United States;* and, after a trial, verdict, and judgment for the plaintiff, a *Hab. Fac. Possess.* issued returnable to *May* T. 1802, upon which the possession was delivered on the 4th of *February* 1802. *Bender* then instituted the present suit, in which the declaration stated the covenant, that the defendant was seised of an indefeasible estate in fee simple, and that he had a good right to convey the same to the plaintiff; and assigned as a breach, that the defendant was not so seised, nor had he good right to convey the said land in fee to the plaintiff. *Profert* of the deed was made, but *oyer* was not demanded. The defendant pleaded *Non infregit conventionem*, on which issue was joined; and, also, performance with leave, &c. to which the plaintiff replied, generally, non-performance, and issue was thereupon joined. At the trial of the cause, in *March* term 1806, upon the recommendation of the Court, and with the consent of the parties, a verdict was taken in these terms: "The jury find for the plain-"tiff 6232 dollars 50 cents: but if the Court shall be of opinion, "that the plaintiff is not entitled to recover the value of the im-"provements made by him, after he purchased of the defendants, "then they find damages 2979 dollars 14 cents, and 6 cents "costs." (1)

Before

(1) At the trial of the cause, a question of some importance occurred. The defendant claimed under a sale by the commonwealth of the premises, as the forfeited estate of *Joseph Griswold*, who, it was alleged, had been attainted, by proclamation, during the revolutionary war. His counsel, with a view to maintain the validity of his title, offered to read the proclamation in evidence. The opposite counsel proved, that the defendant had due notice of *Hilton*'s ejectment; took part in preparing evidence for the trial; and had, in fact, acceded to a settlement, in consequence of the eviction: And, they contended, therefore, that the verdict in that ejectment was conclusive to establish a defect of title. After argument, (in which the plaintiff's counsel cited, *Cro. I.* 304. *Sid.* 289. 3 *Show.* 460. 9 *Co.* 60. *Bradshaw's case*, and the defendant's counsel cited, 1 *Stra* 408.

Before the argument, on the point, which the jury had thus submitted to the court, a motion was made in arrest of judgment, on the following grounds: 1806.

1st. That the declaration was vicious, inasmuch as it did not assign a legal breach of the covenant.

2d. That there was not, in any part of the pleadings, sufficient matter, for the court to render judgment in favour of the plaintiff.

3d. That it is apparent on the record, that the plaintiff has no cause of action.

In support of these objections, it was argued, *for the defendant*, 1st. That the declaration does not aver, that the recovery in *Hilton's lessee* v. *Binder*, was upon a title paramount. *Freem.* 122. *Hob.* 12. 4 *Co.* 80. *Cro. J.* 674, 5. *Hob.* 34. *Ca. temp. Hardw.* 271. *Cro. E.* 917. *Cro. J.* 315. *Cro. E.* 823. *Cro. Car.* 5. *Vaugh.* 118. 2 *Vent.* 61. *Cro. J.* 444. 1 *Mod.* 292. 1 *Lev.* 301. 3 *Mod.* 135. 3 *T. Rep.* 584. 2d. That although the modern authorities admit, that it is sufficient, if the breach is assigned in the same general words, as the covenant; yet, in that case, it is necessary, that the replication should be more specific and particular. *Cro. E.* 544. *Cro. J.* 171. 4. *T. Rep.* 620. For *non infregit conventionem* is no plea, unless the breach is assigned affirmatively. *Co. Litt.* 303. 6. And it is a rule in pleading, that you cannot go to issue on a general averment of performance. 3 *Woodes.* 93. *Cowp.* 578. 3d. That the declaration contains a *profert* of the deed; and, according to the practice of *Pennsylvania*, *oyer* must be presumed,

400. 2 *Rol. Rep.* 6. 28. 287. 8 *T. Rep.* 278.) the chief justice delivered the unanimous opinion of the court:

TILGHMAN, *Chief Justice*. Some difficulty has occurred in deciding this point; but the court have formed an unanimous opinion, that the evidence offered by the defendant, to prove that he had a good title to the land in question, is inadmissible. The title has been already decided in an ejectment, the only mode in which title to land can be *directly* decided; and of that ejectment, the defendant had full notice. If the defendant should now be permitted to give his title in evidence; and the jury should find a verdict in favour of it, the plaintiff's remedy, by action of covenant on the deed, would be gone; and if his title should ultimately fail, on the trial of another ejectment, to be brought by him, he would lose both land and money. But, on the other hand, if the plaintiff recovers in the present suit, it is in our power, by imposing terms upon him, to do justice to the defendant. Indeed, the plaintiff has made our interference unnecessary, by a voluntary offer to execute a conveyance to the defendant of all his right, upon receiving the damages awarded by the jury. He was not obliged (as the defendant's counsel allege) to tender this conveyance, before he brought the suit: it is sufficient if the conveyance is executed, when the defendant pays the damages.

We do not decide, whether the defendant might have gone into evidence of the title, if he had given notice to the plaintiff, immediately after *Hilton*'s recovery, that he was dissatisfied with the verdict, and meant, at his own expence, to prosecute an ejectment against *Hilton*, to try the question a second time. But, so far from pursuing this course, the defendant's conduct has shewn an acquiescence in the verdict and judgment, which *Hilton* obtained.

The evidence refused.

1806. ed, which spreads the deed upon the record. Then, as it will appear, that the deed contains a *special* warranty, in the conclusion, the antecedent express covenant, that the grantor was seised of an indefeasible estate, &c. is thereby restrained and controuled. 3 *Lev.* 46. 1 *Lev.* 57. *Rep. temp. Finch* 96. 2 *Bos. and Pull.* 13. 3 *Bos. and Pull.* 565. 573. Thus, independent of general authorities, the words "grant, bargain and sell," which by themselves, are declared in an act of assembly, to import *a general warranty*, have always been considered as qualified and limited, if the deed contains a subsequent *special* warranty. 1 *St. Laws* 109. And on this construction of the deed, the plaintiff had no cause of action, when the suit was instituted.

For the plaintiff, it was answered, 1st. That the declaration is correct, in technical form; for, in covenant, the breach may be assigned in as general words, as the covenant. 6 *Vin.* 421. *pl.* 2. 9 *Co.* 60. *Cro. J.* 304. 6 *Vin.* 424. *pl.* 3. 2 *Show.* 460. Sir T. *Raym.* 14. *Cro. J.* 369. 2 *Bac. Abr.* 84. 6 *Vin. Abr.* 422. *pl.* 1. *Hob.* 12. 2 *Bos. and Pull.* 14. (*in note*) 3 *Woodes.* 92. 5 *Bac.* 58. 60. 2d. That the cases cited for the defendant arose upon a covenant for quiet enjoyment, which cannot be broken without an actual eviction; but a covenant of title, may be broken without eviction, upon proof that the grantor had not an estate in fee; and, in an action for the breach, it is neither necessary to allege, nor to prove, an eviction. 3d. That the declaration assigns the breach on the first covenant only; and as *oyer* was never prayed, the second covenant is not even before the court. 2 *Saund.* 228. 1 *Saund.* 233. 1 *Lev.* 88. 1 *Saund.* 9. 307. 1 *T. Rep.* 149. 1 *Stra.* 227. Besides, the covenants, though they cannot be regarded as one (which was the case in 2 *Bos. and Pull.* 13.) are neither inconsistent, nor contradictory: the one being a covenant, that the grantor has a good estate; the other being a covenant of warranty; the latter is introduced into deeds by the scrivener, of course; but the former is only inserted upon the agreement and instruction of parties. A special covenant *in fact*, may restrain an implied covenant; but here are two express covenants, which may operate together; and each should be construed most strongly against the grantor. 2 *Keb.* 10. 15. 1 *Sid.* 289. 1 *Lev.* 183. 1 *Sid.* 215.

The chief justice, after stating the pleadings, and the reasons assigned in arrest of judgment, delivered the opinion of the court, in the following terms:

TILGHMAN, *Chief Justice.* As to the first point, although it was opened by the defendant's counsel, yet, I think, in the course of the argument, it was nearly abandoned. It certainly has not been supported; for many cases have been produced, proving that it is sufficient to assign the breach in terms as general as those in which the covenant is expressed; (2) and more than one

(2) 5 *Bac.*

of

of those cases, were upon the very same kind of covenants as the one now in question. 1806.

The second point, amounts, in substance, to this, that the issues were altogether immaterial.

It is an undoubted principle, that verdicts, after a trial of the merits of a cause, are, if possible, to be supported. For this reason, many things are good after verdict, which would be bad, on demurrer. Many things, not alleged in the pleadings, may be presumed to have been proved on the trial; because, unless they had been proved, the jury could not, properly, have given a verdict in the manner they did. One of the authorities (3) cited by the plaintiff's counsel, went to the point; that, upon a breach assigned, that the defendant was not seised of a good estate in fee, &c. to which the defendant pleaded *non infregit conventionem*, and thereupon issue was joined, the issue, though informal, was sufficient for the Court to enter judgment on. Now, this is the very same issue as one of those joined in this cause.

But let us consider the other issue, joined on the plea of performance, with leave, &c. This kind of plea is peculiar to *Pennsylvania*, and is unknown in *England*. It was invented to save the trouble of special pleading, and has been sanctioned by too long a practice, to be now shaken. In fact, it gives the defendant every advantage which he could derive from special pleading, and saves all the labour and danger: for, upon notice to the plaintiff, without form, he may give any thing in evidence which he might have pleaded. A great number of issues, in actions of covenant, have been joined precisely as this is; and if this judgment may be arrested, on account of the immateriality of the issue, all judgments founded on similar issues, are liable to be reversed, on writs of error. In considering the present motion, the Court know nothing but what appears on the record. Now, how can they say, that an issue is immaterial, in which the defendant might, for aught that appears, have given evidence of all those special matters, on which the merits of his defence rested.

The defendant has contended, that it ought to have appeared, either in the plea, or the replication, that the plaintiff had been evicted. But, it is to be observed, that if the cases cited by him, are examined, they will be found to be most, if not all, of them, on covenants for *quiet enjoyment*, where the covenant was not broken without an eviction by better title. But a covenant, that *one is seised of an indefeasible estate in fee*, may be broken without an eviction; and, in such case, the jury will give such damages as they think proper. Upon the whole, I am clearly of opinion, that this issue is not immaterial.

I will now consider the defendant's third point, which is, that it appears, by the record, that the plaintiff has no cause of action.

(3) 5 *Bac. Plea, title, Immaterial and Informal Issues, p.* 59, 60

The

1806. The defendant's argument is founded on this—that the plaintiff, by making a profert of the deed, has brought its whole contents before the Court; that part of its contents, is a clause of special warranty, by which they say, the general covenant on which the plaintiff has declared, is qualified and restrained; and, of course, that the plaintiff has no cause of action, because the defendant only warranted against himself, and those who should claim under him. To this it has been answered, by the plaintiff's counsel, and, I think, truly, that, *oyer* not having been prayed, no part of the deed appears to the Court, but that which the plaintiff has declared on; and, consequently, the Court can take no notice of the special warranty. But I think it best to deliver my opinion on the effect of the special warranty, that the defendant may not be disquieted, by supposing that he had a good defence, which he has lost the advantage of by a slip of his counsel. I subscribe to the principle laid down by Lord *Eldon*, in the case of *Browning* v. *Wright*, (4) cited on the part of the defendant, that where it manifestly appears, from a consideration of every part of the deed, that no more than a special warranty was intended, it shall be so construed, although the deed, in one part, contains words of covenant of more general import. To this rule, I add the two following ones: That, in construing a deed, no part shall be rejected, unless it produces contradiction or absurdity; and that, in doubtful cases, a deed is to be construed in favour of the grantee. The deed in question contains a conveyance by the words *grant, bargain*, and *sell;* a covenant that the grantor is seised of a good estate in fee simple, subject to no incumbrances, but a certain ground rent; and a covenant of special warranty.

It has been the prevailing opinion, that by virtue of an act of assembly, passed in the year 1715, (5) the words "grant, bargain "and sell," have the force of a general warranty, unless restrained by subsequent expressions. To qualify the general warranty, it has been the custom of scriveners to insert a clause of special warranty. And, I believe, it is inserted pretty much as a matter of course, unless in cases where the parties agree on a general warranty. I believe, too, that, in *Pennsylvania*, the greater part of conveyances have, as Mr. *Ingersoll* has stated, been made with special warranty. Still it remains to be considered, what was the intent of the grantor in the present instance? The defendant contends that his intent was, to give no more than a special warranty, because the clause of special warranty is inconsistent with, and contradictory to, a general warranty. Now, in this, I cannot agree with him. It is certain that the special warranty, and more, is included in the general one. It is an inaccurate mode of conveyancing; but there is no absurdity or contradiction, in making one covenant against yourself and your heirs, and another against all

(4) 2 *Bos. & Pull.* 14. (5) 1 *St. Laws*, 109. *s.* 6.

mankind.

mankind. The special warranty was unnecessary, and is to be attributed to the ignorance of the scrivener, who, probably, thought it was a matter of course, without intending to affect the more general preceding covenant; or, perhaps, he might think it necessary to guard against the effect of the words "grant, bargain, and "sell," used in the first part of the deed; because the estate was subject to a ground rent, as appears from the general covenant, in which it is said that the estate is free from all incumbrances, except the said ground rent. It has been urged, that it is all *one covenant*, because the special warranty is connected with the preceding general covenant, by the words *and that*. It is very common, to connect a covenant of *warranty*, and a covenant for *further assurance*, by these expressions. But what I rely on, is the intent of the parties, manifested in the deed considered altogether. I do not conceive it is possible for a man of common sense to declare, that he engages that he had a perfect estate in fee simple, and had a good right to convey such perfect estate, without intending to warrant to a greater extent, than against himself and his heirs. There are no technical expressions, but such as every man understands, which is not the case with a special warranty. To a common man it is not very intelligible, that there should *ever* be occasion to warrant and defend against himself, and all persons claiming under him; for, it is very natural to suppose, that when a man has used words sufficient to convey his estate to a third person, he has necessarily done enough to bar himself and all persons claiming under him, without calling in the aid of a special warranty. In short, the insertion of the clause of special warranty, is generally the act of scriveners; but I presume, that no scrivener could be so stupid as to insert a covenant, that "the grantor was seised of an indefeasible estate in fee," unless he had been told by the parties, that a general warranty was intended. I am, therefore, of opinion, that the special warranty in this deed, has not the effect of controling the precedent general covenant, and that judgment should be entered for the plaintiff. 1806.

It is proper to add, that after the conclusion of the argument last night, I consulted with my brother *Yeates*, who concurs with my opinion, both with respect to the pleadings and the construction of the deed.

The Same Cause.

THE case now came before the court, on the point submitted by the verdict; and this turned upon the question, whether in an action of covenant, founded upon a deed, in which the grantor covenants, that he has a good title to the land conveyed, the grantee, being evicted, is entitled to recover the price of the premises,

1806. at the date of the deed, or the improved value, at the time of the eviction?

For the plaintiff, it was contended, that the measure of damages, on all covenants, is the amount of the loss actually sustained, and though it would seem from the old books, that, in cases of warranty, the recovery is to be according to the value of the land, at the time of the warranty; it was a recovery, in those cases, of land only, and not (as in this case) of money for damages. This position was illustrated and supported by an elaborate argument, and these authorities: 2 *Bl. C.* 299, 300. 304. 22 *Vin.* 145, 146. "*Vouchee.*" 3 *Bl. C.* 156. 1 *Bac. Abr.* 526. 3 *Woodes.* 91. 2. 1 *Ld. Raym.* 107. 2 *Ld. Raym.* 1126. *T. Raym.* 77. 30 *Ed.* 3. 14. 6. 19 *H.* 6. 45. 6. 19 *H.* 6. 61. *Sayre on Dam.* 3, 4, 5, 6. 2 *Caines* 111. *New-York. Bay's Rep.* 18. 263. *South Carolina.*

For the defendant, it was taken as conceded ground, that on a *warranty*, strictly speaking, the value of the land, at the date of the warranty, could alone be recovered, according to the law of *England;* and, it was contended, that there was no legal, or equitable, distinction between that case, and the general case of covenant, further than the enlargement of the remedy; which was limited, by the former, to a recovery in land; but, by the latter, the personal estate, also, becomes liable. 2 *Bl. C.* 304. *Godb.* 152. *Johns. N. Y. Rep.* 379.

The opinion of the court, upon great consideration, was delivered, at an adjourned session, on the 17th of *January* 1807. The chief justice, after stating the facts, proceeded in the following terms:

TILGHMAN, *Chief Justice.* The question submitted to us by the jury, has never been decided in this court. It is of importance, and has been well argued.

It may be taken for granted, that on a strict warranty, where the remedy for the party who loses the lands, is either by voucher, or writ of *warrantia chartæ*, the recovery is only according to *the value of the land at the time the warranty was created.* This is conceded by the plaintiff's counsel, and very properly; for, many authorities were cited directly to the point. But this kind of warranty, which is a covenant *real*, has long ceased, and has been succeeded by the covenants *personal*, introduced into modern conveyances. The latter have two advantages: the remedy by action of covenant is more easy in its form, and more comprehensive in its effects; for, it extends to the personal property of the warrantor in the hands of his executors; whereas the ancient recovery, in value, was confined to land. I know of no case in *England*, where it has been decided, whether a recovery in an action of covenant, could be carried so far as to include damages, for improvements made after the purchase; but, I must suppose, that Sir *William Blackstone* was of opinion, that such damages could not

not be included, otherwise he ought certainly to have mentioned it, when he was comparing the ancient warranty with the modern covenants, which, he says, have superseded them. His expressions are these: "If he covenants for his executors and administrators, "his personal assets, as well as his real, are pledged for the per- "formance of the covenant, which makes such covenant a better "security than any warranty, and it has, therefore, in modern "practice, totally superseded the other." A general warranty, is as comprehensive in its expressions, as any words made use of in modern covenants. It undertakes to defend the land to the warrantee, his heirs and assigns, against all persons whatever. It is in its nature a covenant real; and since the recovery on it extended no farther than the value of the land, at the time of the warranty made, the inference is very strong, that in these personal covenants, which have succeeded to it, the extension shall be no greater. But the plaintiff's counsel contend, that the reason why the recovery in value, on the ancient warranty, was confined to the value, at the time of its creation, is, because in *real actions* no damages can be recovered. This reason is unsound. The value, at the time of the voucher, might have been recovered, without recovering damages; and this is evident, from some of the cases which have been cited; particularly, the case of *Ballet* v. *Ballet*; where it is decided, that in a *warrantia chartæ*, if there be new buildings, of which the warranty is demanded, which were not at the time of the warranty made, the defendant must take care to shew the special matter, and *enter into* the warranty, only for so much as was at the time of the making of the deed, otherwise the plaintiff will recover, according to the value, at the time of *entering into the warranty*. The true reason, therefore, appears to be, that the intention of the parties was so understood, that the warranty should be limited to the value of the land, at the time of executing the deed. 1806.

The plaintiff's counsel cited a case from 22 *Vin. Ab.* 145. *pl.* 5. in order to prove, that upon the implied warranty, which arises on an *exchange* of land, the recovery in value, after eviction, is according to the *actual loss sustained*. As this seemed to be at variance with the general principles of warranty, I have examined it since the argument of the cause, and find that the case was not properly explained. The words of the abridgment are as follow: "If a man recovers in value upon a warranty in "law, on an *exchange*, he shall have in value, according to the "*value which he has lost*." In support of this, the case of *Bustard*, 4 *Coke* 121. is cited. In the first place, it is to be remarked, that in the marginal note to *pl.* 6. in the same page of *Viner*, it is said, that the same case is reported in *Croke Elizabeth*, *Moore*, and *Yelverton*, in neither of which is such point mentioned; and it is certain, from my Lord *Coke*'s report, that the decision must have been extra-judicial; for *Bustard*'s case turned on a different point.

Bustard

1806. *Bustard*, being evicted of the land received by him in exchange, entered upon that which he had given in exchange, by virtue of the *implied condition in law, which is annexed to an exchange;* and a re-entry was made on him; in consequence of which he brought an action of trespass; and whether he could recover in that action, was the question: so that the court had nothing to do with the value of the land. But according to my Lord *Coke*'s account of it, what they did decide concerning the value, is not applicable to the point now before the court. The decision is,—that if *A.* who has received three acres in exchange, is impleaded for *one acre*, and vouches *B.* from whom he received them, and then the demandant recovers the one acre, *A.* shall recover in value from *B.* according to the loss, that is one acre; but not a word is said concerning the *time*, to which the value of this acre is to relate. And that is the only question now under consideration.

It has been contended, that the true measure of damages in all actions of covenant, is the loss actually sustained. But this rule is laid down too generally. In an action of covenant for non-payment of money, on a bond, or mortgage, no more than the principal and legal interest of the debt can be recovered, although the plaintiff may have suffered to a much greater amount by the default of payment. The rule contended for by the plaintiff's counsel, in its utmost latitude, applied to covenants like the present, would, in many instances, produce excessive mischief. Indeed, the counsel have, in some measure, given up this rule, by confessing, that when buildings of *magnificence* are erected to gratify the *luxury* of the *wealthy*, it would be unreasonable to give damages to the extent of the loss; but the ruinous consequences would not be less to many persons, who have sold lands, on which no other than *useful* buildings have been erected. The rise in the value of land, not only in towns on the sea coast, but in the interior part of the *United States*, is such, that it can hardly be supposed any prudent man would undertake to answer the incalculable damages, which might overwhelm his family, under the construction contended for by the plaintiff. I have taken pains to ascertain the opinion of lawyers in this state, prior to the *American* revolution, and I think myself warranted in asserting, from the information I have received, that the prevailing opinion, among the most eminent counsel, was, that the standard of damages, was the value of the land at the time of *making* the contract. The title of land rests as much within the knowledge of the purchaser as the seller; it depends upon writings, which both parties have an equal opportunity of examining. If the seller makes use of any fraud, concealment, or artifice, to mislead the purchaser in examining the title, the case is different, he will then be answerable for all losses which may ensue.

Cases have been cited from the civil law; but I throw them out of view, because this case can be decided only on the principles of the common law.

Cases

Cases have, also, been cited from law reports, in the states of *South-Carolina* and *New-York*. Though they are not authority in this Court, yet we shall always be happy to receive information of the opinions of the learned judges, in our sister states, and always treat them with due respect. Upon the point now in question, it seems there is a difference of opinion. In *South-Carolina* it has been held, that the plaintiff is entitled to recover, according to the value at the time of the action: In *New-York*, that he can only recover according to the value at the time of the contract. On these cases I will only remark, that the opinions of the judges in *South-Carolina*, having been given during the hurry of a jury trial, do not appear to have been founded on such mature deliberation as those of the *New-York* judges, who made their decision in the Supreme Court, sitting in bank. 1806.

Upon the whole, I am of opinion, that by the true construction of the covenants in the case before us, the plaintiff is not entitled to recover the value of the improvements made by him, after he purchased of *John Fromberger*, and, therefore, that judgment be entered for 2979 dollars 14 cents, and costs.

I am authorised to say, that judge *Yeates*, whose absence is occasioned by sickness, concurs in this opinion.

SMITH, *Justice*. The question now to be decided by this Court is of great importance. I understand that it has long been discussed among the most eminent counsel in *Pennsylvania*, and opinions have been given by some of them; but that it never has received a judicial decision. I believe, on inquiry, that it never came before any Court in *Pennsylvania*, until the 24th of *May* 1804, when it came before the Circuit Court, holden for the county of *Northumberland*, by judge *Brackenridge* and myself, in the case of *William Bonham* v. *John Walker*'s administrator. We said that "it "is an important question, and it is proper that it should receive a "solemn decision in bank; we therefore propose, that the measure "of damages should be left to the jury, on each of these grounds, "which is done accordingly." The jury found "a verdict for the "plaintiff, for 1092 dollars 17 cents damages, on the ground of "the original purchase money; and on the ground of the value "of the land at the time of the execution, (eviction) 1602 dollars "21 cents."

After my return, I was induced to make diligent inquiry, whether the point had ever been decided, and what had been the general opinion of eminent counsel on it, and the result was that expressed by the chief justice. Upon a very attentive perusal of the cases on the subject; the notes of which, taken by me then, and annexed to that case, are now before me; they did not, in my opinion, warrant me in drawing a different conclusion; but I saw difficulties, whether the question was decided one way or the other, which made me anxious to hear it deliberately argued: ready to alter

1806. alter my opinion, if I should discover, that it was not well founded; or if the opposite opinion should be supported by law, be more conducive to the general interest, and be more agreeable generally to the intentions of the parties to such contracts.

I have heard it very well argued. If the very well arranged and able argument of the ingenious young gentleman who began (Mr. *Sergeant*) has not been able to shake the opinion which I had formed, I am induced to believe that it is well founded, on solid principles of law. I must, therefore, adhere to it upon the present occasion; it not being suggested that there was any *fraud* or *concealment* on the part of the vendor, nor any *knowledge* when he sold, of any defect in his title. Had *any* of these circumstances occurred, I should be of opinion, that he would be liable to the amount of the loss.

Although the vendor, on a covenant like that in question, be liable to damages only to the value at the time of the deed; yet, he may enter into such a special express covenant, as will make him liable to the value at the time of eviction, and so much will the vendee on such event be intitled to. In the present case I agree, that judgment be entered for the plaintiff for 2979 dollars 14 cents.

BRACKENRIDGE, *Justice*. I concur in the decision of the other judges, for the reasons which have been assigned.

Judgment to be entered in favour of the plaintiff, for 2979 dollars 14 cents, and costs.

Lewis, *Rawle*, and *J. Sergeant*, for the plaintiff.
M'Kean (Attorney-General) and *Ingersoll*, for the defendant.

Dutilh *versus* Gatliff.

THE following case was stated for the opinion of the Court: "Case. On the 24th of *September* 1799, the defendant, *Samuel Gatliff*, underwrote seven hundred and fifty dollars upon a policy of insurance on the schooner *Little Will*, belonging to *John Dutilh* and *Thomas Lillibridge*, for whom the plaintiff was agent, on voyage at and from *Philadelphia* to *Havanna*.

On the 26th of *September* 1799, the *Little Will* sailed on her voyage; from *Philadelphia* for *Havanna*, and on the 8th day of *October* following, she was captured by three *British* privateers, and carried into the port of *Nassau*, *New-Providence*, where she arrived on the 13th of the same month.

Upon her arrival in *Nassau*, the said schooner was libelled in the Admiralty Court, and on the 9th day of *November* following, was regularly acquitted; and in the whole, she remained thirty seven days at *Nassau*, during thirty five of which she was in custody of the captors; but the fact of her acquittal was not known to

to the plaintiff, until subsequent to the abandonment hereafter mentioned: although it was known to *John Dutilh*, one of the owners, and supercargo, who was with her at *Nassau*. 1806.

On the 13th day of *November*, the plaintiff wrote the letter of abandonment, enclosing the papers therein referred to, which was received by the defendant the same day.

On the 20th *November*, the said schooner sailed from *Nassau* for *Havanna*, where she arrived on the 21st of the same month, and sold her cargo, except three boxes plundered at *New-Providence*. Afterwards the said schooner sailed from *Havanna* for *Philadelphia*, where she arrived on the 26th or 27th of *February* in the year 1800, with a cargo of sugars, on which freight became due and was received by *Stephen Dutilh*, for the benefit of those who were entitled to it. Each party refusing to accept the schooner, she was sold for wharfage, and the whole proceeds of sale applied to the payment thereof.

The schooner *Little Will* was *American* property, as warranted.

The QUESTION for the Court is, whether the plaintiff is entitled to recover as for a *total* loss?

If the Court shall be of opinion that the loss was total, then it shall be referred, in the usual form, to three persons, to be appointed by the Court, to ascertain what is due, after the legal and just deductions.

If the Court shall be of opinion it was not a total loss, it shall, in like manner, be referred to three referrees, or any two of them, to be appointed by the Court, to ascertain the partial loss, to which the defendant is liable.

J. Ingersoll, for the plaintiff.
W. Lewis, for the defendant."

After argument, the chief justice delivered the unanimous opinion of the Court.

TILGHMAN, *Chief Justice*. On the case stated, the question submitted to the Court is, whether the plaintiff is entitled to recover for a total loss?

In resolving this question, I shall divide it into two points.

1st. Did there ever exist a *total* loss?

2d. Supposing that there once existed a total loss, has any circumstance occurred, which excludes the plaintiff from recovering for more than a *partial* loss?

1st. The case before us, includes one of the risks expressly mentioned in the policy, *a taking at sea*. But it has been objected, that this taking was not by an enemy; and that when a belligerent takes a neutral, it is to be presumed that the taking is only for the purpose of searching for the property of his enemy, or goods contraband of war; and that, in the end, justice will be done to the neutral.

1806. neutral. To a certain extent, there is weight in this distinction; but it must not be carried too far. At the time when the capture in question was made, the *United States* acknowledged the right of the *British* to detain their vessels, for the purpose of a reasonable search. The bare taking of the vessel, therefore, could by no means constitute a loss; and if under suspicious circumstances, she should be carried into port, to afford an opportunity for a complete investigation, perhaps, even that ought not of itself to be considered as a total loss. On this, however, I give no opinion. But when the captor, having carried the vessel into port, and completed the examination of the cargo and papers, instead of discharging her, proceeds to libel her as prize, I think the loss is complete. The property is no longer subject to the command of the owner, and it is unreasonable that he should wait the event of judicial proceedings, which may continue for years The case of an embargo is less strong; because, there the confiscation of the property is not intended, and a temporary interruption of the voyage is all that, in general, is to be apprehended. Yet the assured is not obliged to wait the result, but may abandon immediately on receipt of intelligence of the embargo. Not many judicial decisions have been produced on the point in question. Where principles are strong, it is sufficient that there have been no decisions to the contrary. It appears, however, that in the state of *New-York*, the precise point has been determined. In the case of *Mumford* v. *Church*, decided in the Supreme Court of *New-York*, *July* term, 1799, the assured recovered for a total loss, where there was a capture, carrying into port, and libelling by a *British* captor, although *after the abandonment* the property was restored. It is necessary that some general rule should be established, some line drawn, by which the assured may know at what time he has a right to abandon. In most cases, the voyage is extremely injured by proceedings in the Court of Admiralty, and the event is doubtful. For it cannot be denied, that of late years, such extraordinary occurrences have taken place in war and politics, as have very much affected the principles and practice of foreign Courts of Admiralty. Whatever may be said of the law of nature and nations, and the immutable principles of justice, we see very plainly that the Courts obey the will of the sovereign power of their country; and this will fluctuates with the circumstances of the times. I am, therefore, of opinion, that both by the words and spirit of a policy of insurance, the assured may abandon, when he receives intelligence of the libelling of his vessel.

2d. This brings me to the consideration of the second point: Has any circumstance occurred, which limits the plaintiff to a recovery for only a partial loss?

It is contended, that such an event has occurred: that the vessel was acquitted by the decree of the Court of Admiralty; that after acquittal, she proceeded on her voyage, and that one of the owners

owners was on the spot, and knew of the acquittal. I do not think there is much weight in the circumstance of one of the owners being on the spot; because the general agent of all the owners was in *Philadelphia*. This general agent effected the insurance, and conducted all the business with the underwriters, and the owner, who was in *New-Providence*, gave him intelligence of what occurred from time to time, and by no means intended, from any thing that appears, to restrain him from making an abandonment. It is true, that the vessel proceeded on her voyage after she was restored: but it is not stated, nor can the court presume, that any of the owners acted in a manner inconsistent with the abandonment made by their agent. It was proper, at all events, to pursue the voyage for the benefit of whoever might be interested in it. This is the usual practice, and a practice authorized by the policy, and very much for the advantage of the underwriters. 1806.

The only difficulty in the case before the Court, arises from this circumstance; that before the action was brought, the vessel was restored, and even at the time of the abandonment, there was a decree of acquittal, although restitution does not appear to have been actually made till some days after. The counsel for the defendant have relied much on the opinion of Lord *Mansfield* in the case of *Hamilton* v. *Mendez*, to establish this principle, that a policy of insurance, being in its nature a contract of indemnity, the plaintiff can recover no more than the amount of his actual loss at the commencement of the action. There is no doubt of the soundness of the principle: I mean that a policy is a contract of indemnity. The only question is, *at what period* the rights of the parties are to be tested by this principle; whether at the time of abandonment, or of the commencement of the action. I have considered attentively the case of *Hamilton* v. *Mendez*. It must be obvious to every one, that the decision in that case was perfectly right. It was simply this; that a man shall not be permitted to abandon, and recover for a total loss, when he knew, at the time of his offer to abandon, that his property, which had been lost, was restored, and the voyage very little injured. But in reading the opinion of Lord *Mansfield*, we find a want of accuracy, with which that great man was seldom chargeable. Sometimes it appears as if he thought the period, for fixing the rights of the insurers and insured, was the commencement of the suit; sometimes the time of abandonment; and sometimes he even seems to extend his ideas so far as the time of the *verdict*. But, finally, he explicitly declares, that he decides nothing but the point before him. He seems to have felt a little sore, at the improper application of some general expressions used by him, in the case of *Goss* v. *Withers*. Anxious to cut off all pretence for doing the same in *Hamilton* v. *Mendez*, he has taken too much pains to avoid the possibility of misrepresentation. Hence his argument, considered in the detail, is not altogether clear and consistent. Upon the whole of this case of *Hamilton* v. *Mendez*, I think it most safe to confine its authority to the point

1806. actually decided, which was very different from that we are now considering. Some period must be fixed for determining the right of the parties. To limit it to the *time of commencing the action* would be of little service to the insurers; for the law being once so established, an action would be brought in every instance on the first default of payment. The *time of abandonment* seems the most natural and convenient period; because the assured must make his election to abandon or not, in a reasonable and short time after he hears of the loss, and the property, being transferred by the abandonment, can never after be reclaimed by the assured. Want of mutuality is want of justice. There is no reason why the assured should be bound, but the assurer left free, to take advantage of events subsequent to the abandonment.

It has been contended by the plaintiff's counsel, that the right to abandon would not have been affected, even if the property had been restored at the time of abandonment, because the restitution was unknown to the plaintiff. As to this, I give no opinion. It is unnecessary; because it is stated that the vessel remained in the *custody* of the *captors* at the time of abandonment. The defendant's counsel have urged, that this was the fault of the captain, or of one of the owners, who was at *New-Providence*; because, after a decree of acquittal, a writ of restitution might have been sued out. But it not being stated, that there was any fault or negligence in the captain or owner, I do not think that the Court can infer it. It being stated that the vessel remained in the custody of the captors, we must presume that the custody was legal. Whether for the purpose of giving the captors an opportunity of entering an appeal, or for what other purpose it was that the restitution was delayed, we are at a loss to determine. But, as restitution was not actually made, and as the plaintiff was ignorant, even of the decree of acquittal, his right to abandon remained unimpaired.

Upon the whole, we are of opinion, *that the plaintiff is entitled to recover for a total loss.*

Judgment for the plaintiff. (1)

Moliere's Lessee *versus* Noe.

EJECTMENT for a house and lot in *Union* street, between *Second* and *Third* streets. The plaintiff's title was briefly this: *George Fudge* was seised of the premises in the year 1796; when *Moliere*, as the assignee of one *Weston*, instituted three suits

(1) Since the decision of this case, the case of *Rhinelander* v. *The Insurance Company of Pennsylvania*, was argued in the Supreme Court of the *United States*, at *Washington*, in *February* term 1807, upon a writ of error from the Circuit Court of the *Pennsylvania* district; and that Court (consisting of MARSHALL, *Chief Justice*, CHASE, JOHNSTONE, and LIVINGSTONE, *Justices*) were of opinion, that in the case of neutral, as well as of belligerent, property, the assured has a right to abandon, and to claim for a total loss, as soon as the vessel is arrested, taken possession of, and carried out of the course of her voyage.

against

against him, upon several bonds, returnable to *March* term 1796, in which judgments were regularly obtained. *Fudge* died, and the judgments were revived against his administrators, by writs of *scire facias*, returnable to *December* term 1799; judgments were thereupon entered, on the 27th of *December*; writs of *fi. fa.* issued, returnable the 28th of *December*, and were returned, "levied upon "real estate, inquisition held, and property condemned." On the 15th of *January*, a *Vend. Exp.* issued returnable to *March* term 1800, which was returned, that the premises had been sold to *Moliere* for 1000 dollars; and on the 3d of *March* 1800, sheriff *Penrose* executed a deed to the purchaser. 1806.

The defendant was tenant to *Mary Beers*, who claimed the premises under a sale made by order of the Orphan's Court, upon the petition of the administrators of *Fudge*; the intestate having left two minor children. The petition was presented in *May* 1797, with a list of the creditors of the estate, in which *Moliere*'s judgments were referred to; the order of the Orphan's Court was made in *June* 1797; the sale was effected in *July*; and the administrators executed a deed to Mrs. *Beers*, for the premises (reciting the proceedings of the Orphan's Court) in consideration of 1200 dollars, on the 10th of *August* 1797. Subsequent to the sale, and receipt of the money, both of the administrators became insolvent.

On the trial of the cause, at *Nisi Prius*, in *July* 1806, two grounds of defence were taken, 1st. That *Moliere* had allowed Mrs. *Beers* to purchase and repair the estate, without giving her notice of his claim, though he was apprised of the order of sale, by the Orphan's Court, and the proceedings under it. 2d. That upon the sale of the estate, by order of the Orphan's Court, it was discharged from all prior judgments, in the hands of the purchaser. On the first ground, both the chief justice (who sat at *Nisi Prius*) and the jury (as appeared from the charge and the verdict) were in favour of the plaintiff; and the second ground was reserved for the decision of the Court in Bank.

The point reserved was argued on the 10th of *December* 1806, by *Levy*, *M'Kean*, *S. Levy*, and *J. Sergeant*, for the plaintiff, and *Ingersoll* and *Hopkinson*, for the defendant: and the following sections of several acts of Assembly, became material in the discussion.

By the 6th section of the act of 1705 (1) (*Galloway's edit. p.* 34.) it is provided, "That if any person or persons shall die in-"testate, being owners of lands or tenements within this province "at the time of their death, and leave lawful issue to survive them, "but not a sufficient personal estate to pay their just debts and "maintain their children, in such case, it shall be lawful for the

(1) YEATES, *Justice*. It has often been decided, at *Nisi Prius*, that under this act, the Orphan's Court might order a sale of lands, although there were no minor children in the case.

"administrator

1806. "administrator or administrators of such deceased to sell and "convey such part or parts of the said lands or tenements, for "defraying their just debts, maintenance of their children, and "for putting them apprentices, and teaching them to read and "write, and for improvement of the residue of the estate, if any "be, to their advantage, as the Orphan's Court of the county "where such estate lies shall think fit to allow, order and direct, "from time to time."

By the 21st section of the act of *April* 1794, (3 *vol. Dall. edit.* 530.) it is provided, "that no lands, tenements, and hereditaments, "so as aforesaid sold by the Orphan's Court, shall be liable, in "the hands of the purchaser, for the debts of the intestate."

By the 2d section of the act of *April* 1794, (*Ibid* 523.) it is provided, "That no debts of deceased persons, except they be "secured by mortgage, judgment, recognisance, or other record, "shall remain a lien on their lands and tenements, longer than "seven years after the decease of such debtors, unless, &c."

By the 4th section of the act of *April* 1797 (4 *Vol.* 157. *Dall. Edit.*) the same limitation is imposed on the lien of debts, unless a suit is brought, or a statement of the demand filed in the office of the prothonotary of the county where the lands lie, within the seven years.

For the defendant, it was insisted, that, by the act of *April* 1794, the purchaser, under an order of the Orphan's Court, held the land discharged of all the debts of the intestate, whether secured by judgments, or not. The word *debts* includes *judgments;* and the legislature generally uses it, in that comprehensive sense. *Prov. Laws*, (1785) 34. *s.* 3. 6. *Ibid.* 132. 3 *St. L.* 522. *s.* 1. *Ib.* 523. *s.* 1. 2. *Ib.* 529. *s.* 19. *Ib.* 527. 4 *St. L.* 157. This construction, however, does not extend to mortgages, which are a specific lien created by the act of the party; but only to judgments, to which, as the law gives the lien, the law may, also, take it away. 1 *Dall. Rep.* 481. 486. The words of the act are, then, clearly in favour of the purchaser; and it is not incumbent upon him to look to the application of the money. 9 *Ann. c.* 14. *s.* 1. *Lov. on B.* 37. 2 *T. Rep.* 645. 2 *Fonbl.* 153.

For the plaintiff, it was answered, that the object of the act of 1794, was to provide for the sale of real estate, in order to pay debts at the instance of creditors, who had not obtained judgments, and, therefore, could not, themselves, compel a sale of the land; that from the year 1705 to the year 1794, the sale was not accompanied with any condition, that the purchaser should hold the land free from the debts of the intestate; and the inconvenience to be remedied by that provision, arose from the latent claims, referred to, in 1 *Dall. Rep.* 481. not from judgments, mortgages, or other liens, of record; and that words, however general, must

often

often be construed particular, in order to attain, without exceeding, the real object of the legislature. 1 *Dall. Rep. Levinz* v. *Will. Plowd.* 109. 305. 2 *East*, 135. 1806.

On the 20th of *December* 1806, the chief justice delivered the opinion of the Court, in the following terms:

TILGHMAN, *Chief Justice.* This cause was tried before me at a Court of Nisi Prius, held last *July*, when the point was reserved, which is now to be decided. Without entering into an unnecessary detail of facts, the question may be stated to be simply this: whether the purchaser of lands of a deceased person, sold by order of an Orphan's Court, since the 19th of *April* 1794, holds them discharged from the lien of a judgment, obtained against the intestate in his life.

Ever since the year 1705, the Orphan's Court have had power, to order sale of such part of the land of persons dying intestate, as they judged necessary, for the payment of their debts, education and maintenance of their infant children, and improvement of the residue of the estate. But it was not, until the passing of the act of the 19th of *April*, 1794, (2) that any express provision was made with respect to the manner in which the purchaser should hold the land: I mean, whether it should be liable or not, in his hands, to the debts of the intestate. Yet, although there was no legislative provision, the public mind had, probably, received an impression from the sentiments of the late chief justice *Shippen*, delivered, when he was president of the Court of Common Pleas, in the case of *Graff* v. *Smith*'s administrators.(3) The question before the Court, in that case, did not, it is true, regard a judgment creditor; yet the expressions of the president are very general, and seem strongly to intimate an opinion, that the purchaser should hold the lands discharged even from judgments. I do not mean, however, to say, that that point was decided. After this decision, in the year 1789, came the act of the 19th of *April* 1794, which I shall now consider.

(4) The 19th section gives the same power, which had been vested in the Orphan's Court, by the act of 1705, that is to say, to order sale of such part of the lands, as they should, from time to time, think proper, for the payment of debts, maintenance and education of children, and improvement of the residue of the estate.

The 20th section forbids the Court to order a sale, until they have ascertained, in the manner therein mentioned, the amount of the intestate's personal estate, and of the debts due from him.

The 21st section declares, "that no lands or tenements so as "aforesaid sold, by order of the Orphan's Court, shall be liable "in the hands of the purchaser, *for the debts of the intestate.*"

If we consider the plain meaning of these words, the lands thus sold, are discharged from the lien of judgments. I think no man, learned or unlearned, would understand the word debts, as

(2) *St. L.* 521. (3) 1 *Dal.* 481. 486. (4) 3 *St. L.* 526.

excluding

1806. excluding judgments. The counsel for the plaintiff do not contend so; but they argue, that although a judgment is a debt (taking the word debt in its largest signification) yet, to avoid great injustice and inconvenience, the legislature must be supposed to have intended only those debts, which were not a lien, in the life of the intestate. The avoidance of injustice, and inconvenience, is a most desirable object, and the Court will always strive to attain it. But they must not overleap the bounds of their duty. They have power to construe laws, but not to make, or alter them; and where the meaning of the legislature is plain, the Court have no right to regard inconveniencies. General expressions have sometimes been construed, so as to be restrained to particular cases; but to authorise such construction, it must appear that the use of the words, in their *general* sense, would produce absurdity, contradiction, or such flagrant injustice, as it could not be supposed the legislature meant to sanction. Upon a careful examination of the act in question, I cannot see that the discharge of the lands from the lien of judgment in the hands of the purchaser, will produce any such consequences. No inconvenience will result, if the Orphan's Court and the administrator do their duty. The lands will certainly sell better, for being discharged from liens; and it makes no odds to the judgment creditors by what person they are sold, provided they are sold fairly, and the proceeds faithfully applied. I am clearly of opinion, that they must be applied to the payment, in the first place, of the liens which existed in the life of the intestate, according to their respective priority. There is no intimation in any part of the act, to the contrary, and to say, that judgment creditors should not have a preference, in the application of such proceeds, would produce this monstrous injustice, that those creditors would preserve the benefit of their lien, in case a man made a will, but lose it if he happened to die intestate.

Before I dismiss this subject, I will give my opinion concerning debts due by mortgage, which were mentioned in the course of the argument. I conceive them to stand on a different footing from judgments, because the mortgagee, is, strictly speaking, the owner of the land, and may recover it in an ejectment. The mortgagor has no more than an equity of redemption; nor have the Orphan's Court power to sell a greater estate than he is lawfully possessed of. It will be seen, that in the 14th section of the act, where the order in which debts shall be paid is designated, there is no mention of *mortgages*, which evidently shews that the legislature took it for granted, that the mortgagee looked to the land for his security. The question now decided, is of importance to the public, particularly as different opinions have been entertained concerning it. As it must henceforth be considered as settled, I make no doubt but the Orphan's Court, in the several counties, will use proper vigilance to prevent injury to judgment creditors.

They

They have full power to see that sales are made fairly, and with due notice, and to exact security from the administrator, in proportion to the increased funds which may come to his hands. These precautions, assisted by the attention of the creditors to their own interest, will, I flatter myself, produce sales to the greatest advantage, and faithful application of their proceeds. 1806.

My opinion is, that the defendant, the purchaser at the sale ordered by the Orphan's Court, holds the land, discharged from the plaintiff's judgment.

YEATES, *Justice*, who was present at the argument, informed the chief justice that he concurred with this opinion; and

BRACKENRIDGE, *Justice*, expressed his concurrence, generally.

Judgment to be entered for the defendant.

Morgan *et al*, *versus* The Insurance Company of North America.

THIS was an action upon a policy of insurance, on the freight of the brig *Amazon*, valued at 3,500 dollars, upon a voyage from *Philadelphia* to *Surinam*. The policy contained a warranty of *American* property, and the usual clause against illicit trade.

On the trial of the cause, before the chief justice, at *Nisi Prius*, in *July* 1806, it appeared that upon the 7th of *August* 1799, when *Surinam* was in possession of the *Dutch*, the vessel sailed on the voyage insured, and arrived at the river of *Surinam*, on the 17th of *September* following; that the brig was detained at the entrance of the river, by the commander of the *British* fort, who informed the captain, that the colony of *Surinam* had been in possession of the *British* forces about twenty days; that the captain, and a passenger of the name of *J. G. Richter* (who was an inhabitant of *Surinam*, and to whom the cargo was deliverable there, on his paying 25,310 dollars, in pursuance of a contract with the plaintiffs, *Morgan* and *Price*) proceeded to the town of *Paramanto*, and the cargo was there tendered and agreed to be accepted by *Richter*; who gave security for paying the stipulated price, as soon as possible after the delivery, in conformity to the contract. On the 19th of *September*, the governor of the colony gave permission for the brig to be brought up to town, where she, accordingly, arrived the next day, for the purpose of discharging her cargo; that on reporting, however, to the custom-house, the collector declared, that he would not permit any article to be landed, excepting the provisions, (which did not amount to more than one-eighth of the cargo) and that permission to land the cargo generally, was repeatedly solicited by the captain, but refused by the governor; in consequence of which, it was brought back to *Philadelphia*.

1806. *Philadelphia.* Upon these facts, related in the captain's protest (1) the plaintiffs abandoned, and claimed for a total loss of the freight insured. And it was agreed to state them in a case, for the opinion of the Court.

The general question was, whether the plaintiffs were entitled to recover, either for a total, or for a partial, loss of freight? And the solution was considered, by the counsel on both sides, as depending upon the inquiry, whether the freight had been earned, in whole, or in part; and if not, whether the loss was occasioned by a peril enumerated in the policy.

For the plaintiff. By the bill of lading, the master is obliged to deliver the goods, (the danger of the seas only excepted) and freight is only payable on the delivery. *Beawes, Lex Merc.* 137. *Ab.* 179. 183. If a foreign government prevents a landing of the cargo, it prevents an earning of the freight, by an arrest, restraint, and detainment; as much, surely, as in the decided case, of the foreign government refusing to permit a cargo to be shipped, for which the vessel was sent. 3 *Bos. and Pull.* 295. 8 *T. Rep.* 267. 1 *Brownl.* 21. 7 *T. Rep.* 385. *Abbot*, 261. 3 *Bac.* 610. *Lex Merc.* 267. *Park*, 292. 3 *Rob. Rep.* 152, 3. 7 *T. Rep.* 383. 2 *Vern.* 176. *Perot* v. *Penrose, in Supreme Court of Pennsylvania.* A policy on goods continues in force till the goods are landed. 1 *Marsh.* 162. and all policies should be liberally construed, for the benefit of trade. *Ibid.* 164, 5. In the present case, there is no proof of the delivery of the cargo at *Surinam*; but, on the contrary, it appears, that *Richter* agreed to pay for it, as soon as possible after it was delivered; and as the delivery depended upon the landing, it is virtually disproved by the evidence, that the governor always refused to grant a permit for the landing.

For the defendant. On the evidence, there was an arrival of the vessel at her port of discharge; and the tender and acceptance of the delivery of the cargo, entitled the owner to his freight. The owner of the ship was not bound to procure a permission to land the goods. Besides, it is not denied, that seamen's wages were paid; and wages are never payable, but in cases where the freight is earned. But even the loss, if established, was not occasioned by a peril insured against. There was no arrest, no restraint, no detainment; but merely the refusal of a right of entry. *Ord. L.* 14. 1 *Val.* 656. *Art.* 15. *Ib.* 626. *Art.* 7. *Doug.* 622. 626, 7. *Poth.* 60. *s.* 69. 2 *March.* 434, 5, 6, 7. 1 *Marsh.* 162. 164, 5. *Ab.* 161. 2 *Burr.* 887.

(1) When the protest was offered to be read, the defendant's counsel observed, that the Circuit Court of the *United States* had refused to admit the protest in evidence, and submitted the competency of such evidence on the present occasion. But by the COURT, The practice of *Pennsylvania* has been long settled. The protest has invariably been received as evidence in the state Courts.

The

The chief justice delivered the following opinion, in which BRACKENRIDGE *Justice*, concurred. 1806.

TILGHMAN. *Chief Justice.* This is an action on a policy of insurance on freight of the brig *Amazon*, from *Philadelphia* to *Surinam*, valued at 3500 dollars.

The brig sailed from *Philadelphia* on the 7th of *August* 1799, with a cargo consisting of provisions and merchandize, and arrived in the river *Surinam*, on the 17th of *September* following. During the voyage, the colony of *Surinam* was conquered by the forces of the king of *Great Britain*. Permission was obtained from the *British* commander, for the brig to go up to the town of *Paramanto*, and she arrived there with her cargo, on the 20th *September*. On her arrival, the captain of the brig, in pursuance of instructions from the owners, as well as in pursuance of an agreement between the owners and a certain *J. A. Richter*, who was a passenger in the said brig, offered to deliver the cargo to the said *Richter*, upon his paying, or giving security to pay, 25,310 dollars. *Richter* agreed to pay that sum *as soon as possible after the delivery of the cargo*, and actually gave good security for the money. But the *British* collector of the customs, refused permission to land any article of the cargo, except the provisions, nor could such permission be obtained, although repeated petitions were presented to the government. The consequence was, that the cargo was not landed, and the captain entered his protest. The brig remained at *Paramanto* till the 27th of *September*. The plaintiffs were owners both of the brig and cargo.

The question is, whether the plaintiffs are entitled to recover, either for a total loss, or for a partial loss, on this policy?

The plaintiffs' counsel contend, that they are entitled to recover for a total loss; that the landing and delivery of the cargo, is an essential part of the contract between the owner and freighter, and not being complied with, no part of the freight has been earned; and that the circumstance of the same persons being owners of the brig and cargo, is immaterial in a question between the assurers and assured. On the other hand, the defendants' counsel say, that there has been no loss, because the freight was completely earned.

No adjudged case, in point, has been cited on either side. The defendants' counsel relied on the case of *Blight* v. *Page*. 3 *Bos. and Pull.* 295. (*not.*) but I do not think that case applicable. The owner of a vessel agreed to go to a certain port, and take in a cargo of barley, to be carried on freight. When the vessel arrived at the port, the defendant, could not furnish the cargo according to his agreement, because the government refused to permit the exportation of barley. The owner sued the defendant, for not complying with his contract, and recovered damages equal to the amount of the freight. This only shews, that the interference of the government did not excuse the defendant from complying

1806. with his contract. The plaintiff had done every thing necessary on his part, and was prevented from earning his freight, by the breach of contract on the part of the defendant. No conclusion can be drawn from this case, under what circumstances freight may be earned, or not earned. For, it was not an action for the recovery of freight, but of damages, for not being permitted to earn freight.

But, although there is no adjudged case, the subject has not escaped the notice of writers on the marine law. In one of the ordinances of *Lewis* XIV. (A. D. 1681) (1) it is declared, that on a charter party to carry goods *out* and *in*, if, during the voyage, the commerce is prohibited and the vessel returns, the outward freight only is earned; and *Valin*, in his commentary on this article, says, the law is the same, if the vessel is freighted *outward only*. These ordinances, and the commentaries on them, have been received with great respect, in the Courts both of *England* and the *United States*; not as containing any authority in themselves, but as evidence of the general marine law. Where they are contradicted by judicial decisions in our own country, they are not to be respected. But on points which have not been decided, they are worthy of great consideration. I am strongly inclined to adopt the rule laid down by *Valin*, because I think it reasonable. The owner of the ship has been in no fault whatever. When he took the goods on freight, there was an open commerce between *Philadelphia* and *Surinam*; the goods were carried to the port of delivery; the vessel waited there seven days, and the captain offered to deliver the cargo to the consignee, who refused to receive it. Nothing prevented it, but the prohibition of the *British* government. It is not like the case of a vessel which is prevented from entering the port of delivery, by a blockading squadron; for there the voyage is not performed, and it is impossible to say, *certainly*, that it would have been safely performed, if there had been no blockade. I think it most agreeable to reason and justice, that the obtaining permission to land the cargo, should, in this case, be considered as the business of the consignee. That being established, it follows that the freight was earned.

Upon the whole of this case, I am of opinion, that the plaintiffs are not entitled to recover, either for a total or a partial loss.

(1) 1 *Vol Ord. Lewis XIV.* 656. *Art.* 15. *title Freight, cited by Abbot.*

1806.

Sansom *versus* Ball.

CASE on a policy of insurance, upon the freight of the ship *Richmond*, for a voyage, at and from *Philadelphia* to *Batavia*, and thence back again. The premium was 20 per cent. "to "return five per cent. if the ship proceeds only to *Batavia* and back "to *Philadelphia*, and no loss happens;" and the insurance was declared to be "on freight advanced here, and which, by agreement, is valued at 13,500 dollars." The policy, also, contained the usual clause, that there should be no average loss recovered, if less than 5 per cent. unless it was general.

On the trial of the cause, it appeared, that the *Richmond* was owned by Messrs. *Jesse* and *Robert Waln*; that the plaintiff purchased from the owners, three-eighths of the tonnage of the ship, for the voyage, at the price of 10,837 dollars 50 cents, which was paid before the ship sailed; that the *Richmond* proceeded safely to *Batavia*, but, on her return thence to *Philadelphia*, she was captured by a *French* privateer, who ordered her to *Guadaloupe*, and she was afterwards re-taken by a *British* ship of war, who carried her into *Martinique*; that upon a libel for salvage at *Martinique*, one half of the full value of the ship and cargo was decreed to the re-captors, and the claimants charged with all costs; and that by agreement between the captain and the supercargo, on the one hand, and the re-captors, on the other, one half of the cargo was specifically delivered to the latter, and 2750*l.* fixed for the salvage on the ship, which was paid by a draft on the owners at *Philadelphia*, secured by an hypothecation.

The present suit was brought to recover an average loss; and the case being submitted for the opinion of the Court, two questions were discussed: 1st. Whether the subject described in the policy was an insurable interest. 2d. Whether, under all the circumstances of the case, the insurers were liable for a general average. (1)

1st. The plaintiff's counsel, contending that the interest was insurable, urged, 1st. *That it was a lawful interest.* It is the payment of a sum of money, for the benefit of bringing home a return cargo, either as owner, or upon freight. There is no general law, no law of *America*, or of *England*, against the payment of freight in advance, whatever may be the law of *France*; 2 *Marsh.* 644. and there is scarcely a subject of property, for which

(1) Mr. *Fitzsimmons*, a merchant and underwriter of great intelligence and experience, proved, at the trial of the cause, that the interest, acquired by the plaintiff, in the tonnage of the ship, was a well known subject of insurance in *Philadelphia*. He, also, proved, that an adjustment of the average loss, on the present voyage, had been made; in which the insurance companies, and most of the private underwriters, had acquiesced. On the effect of the adjustment the plaintiffs cited *Park.* 118. *March.* 244.

a price

1806. a price is paid and received, that may not be the subject of insurance, unless where general policy forbids; as in the case of seamen's wages. *Park.* 9. (5 *Edit.*) *Ib.* 103. Nor, can this be considered as a double insurance; for it is a distinct interest; and different insurances may be effected by different persons, having different rights, in the same property. 1 *Marsh.* 282. *Park.* 103. Nor is it a loan upon bottomry; for it was not advanced on the pledge of the ship herself, but for the use of her tonnage; and it is immaterial, that the valuation in the policy, exceeds the actual cost; as the plaintiff had a right to cover the premium, charges, interest, and profit, as well as his advance. 2d. The interest insured was liable to hazard and loss; and, therefore, it was insurable. If the ship had been totally lost, the plaintiff's use of the tonnage, for which he had paid, was gone, and the owner of the ship could not be compelled to refund. 3d. The interest is well described in the policy. It is not a purchase of a share in the vessel; but of a right to convey goods in her, upon the voyage insured; and the transaction does not violate the registering act, on the point of ownership, (2 *vol.* 147. *s.* 14. *Swift's Edit.*) or even, on the supposition of its amounting to a sale of a part of the vessel, it only forfeits the *American* privileges; it does not affect the insurable quality of the interest acquired. But, again: when it is objected, that none but the owners of a ship can recover upon an insurance of freight; the objection obviously arises from confounding the purchase of the right of freight, paid in advance, with freight to be earned and received, at the end of the voyage. It is clear, that the owners of the ship could not insure, (and certainly they did not attempt it) as freight, the tonnage purchased by the plaintiff. And when the plaintiff proposed the insurance, the intention of the parties, according to the facts disclosed, without objection at the time, ought to govern the construction of the policy. *Park.* 439. (4 *Edit.*)

2d. On the second point, the plaintiff's counsel insisted, that whether the salvage was considered as freight, or as a charge upon goods, the interest insured was liable to a general average; and, if so, the underwriters on the present policy were bound to furnish an indemnity. Ship, freight, and cargo, contribute to general average. *Park.* 121. *Abbot* 215.(*Am. Edit.*) 1 *East*, 220. If it is essential to a general average, that the loss should be voluntarily incurred, surely the payment of salvage, upon a re-capture, is an act as voluntary, as throwing goods into the sea, upon the coercion of a tempest. Nay, it is within the express stipulation of the policy, that the assured shall labour to recover the property from any jeopardy, in which it is involved, by a risque insured against. *Park.* 140, 1. 123. *Ab.* 218. 2 *Burr.* 1213. 1 *Mag.* 245. 1 *Rob. Rep.* 86. And, if ship, freight, and goods, should all contribute to a general average, the plaintiff's interest in the use of the ship could only contribute in this way; and, contributing at all, is entitled

titled to an indemnity. 2 *Marsh.* 460. *Park.* 124, 5, 6. (4 *Edit.*) *Ab.* 290, 1. 1806.

1st. The defendant's counsel contending that the interest was not insurable, argued, that it was in the nature of bottomry; and, therefore, not insurable, unless specifically; and even then, there could be no recovery for an average, but only for a total, loss; that the idea of freight, is inseparable from a completion of the voyage, and none but the owner of the ship can recover freight; and that there is no instance of a person, who is merely liable to pay freight, being liable to contribute to the payment of a general average; *Ab.* 179. 2 *Bos. and Pull.* 321. 2 *Marsh.* 644. 1 *Marsh.* 93. If the purchase is considered as a purchase of part of the vessel, then no legitimate contract can be founded on it, unless the vessel is registered anew. 2 *vol.* 147. *s* 14. (*Laws of U. S. Swift's Edit.*)

2d. On the second point, the defendant's counsel contended, that the decree of the Court only affected the ship and cargo (not the freight) with the payment of salvage; that nothing but a general average can affect freight; and a general average calls for a voluntary sacrifice of a part, to preserve the rest, of the property; whereas the loss on the salvage was compulsory. 1 *Johns.* 406. 410. *Ab.* 220. *Park.* 122. 130.

The chief justice, after stating the general facts, delivered the unanimous opinion of the Court, in the following terms.

TILGHMAN, *Chief Justice.* In this case two questions have been made:

1st. Had the plaintiff an insurable interest?

2d. If it was insurable, was it liable to a general average?

1st. In order to determine whether the plaintiff's interest was insurable, we must first ascertain the nature of it. It seems to be a kind of interest, not much known in *Europe*, though well known in this city. The plaintiff advanced a sum of money to the owners of the ship, in consideration of which, they gave him a right to fill up three-eighths of the tonnage of the ship, for that voyage, with goods, either his own, or the property of others. It is called in the policy, "freight advanced," an expression well calculated to shew its meaning. All countries, and even all cities, have singularities of expression. All new inventions, either in commerce or the arts, give rise to new modes of speech, which, when once introduced into contracts, are recognised by Courts of justice, whose duty it is to carry into execution the intention of the contracting parties. Now, what is there in this interest, which should exclude it from the benefit of insurance? there is nothing unlawful in it. It is subject to loss; for, whether the plaintiff used the tonnage for the transportation of his own goods, or of the goods of others, he would lose his money, unless the ship performed the voyage in safety. Indeed, I think Mr. *Ingersoll*, in arguing

1806. arguing for the defendant, conceded that the plaintiff's interest might have been insured, if it had been properly described; but he conceived it to be in the nature of bottomry. This it certainly cannot be; there was no loan of money. Messrs. *Walns* were obliged to make no payment to the plaintiff, but the plaintiff was entitled to make what he could from the tonnage he had purchased. Whether it was more, or less, Messrs. *Walns* had nothing to do with it. The testimony of Mr. *Fitzsimmons* goes far towards proving, that the plaintiff's interest was well described, and was a proper object of insurance. In the case of *Gregory* v. *Christie*, (*Park.* 11.) my Lord *Mansfield* thus expresses himself, "I should "think that the words "goods, specie, and effects," did not extend "to the plaintiff's interest, if we were only to consider the words "by themselves. But here is an express usage, which must go- "vern our decision. A great many captains in the *East India* "service swear, that this kind of interest is always insured in "this way." Now, though there have not been a *great many* witnesses in this cause, yet there has been *one*, very much conversant in the business of insurance, who stands uncontradicted. Upon this first point, therefore, the insurability of the plaintiff's interest, whether it is considered on principle, or on usage, I have no doubt but the law is with the plaintiff.

2d. But was the plaintiff's interest liable to general average?

General average, or general contribution, is founded on principles of justice and sound policy. It arises, when a sacrifice of part has been made for the preservation of the residue, or, when money is expended, to preserve the whole. Thus, the loss occasioned by cutting away of masts, or throwing goods overboard to lighten the ship, in a storm, or money paid to redeem ship and cargo, which had been captured, are subjects of general average; ship, cargo, and freight, have been benefited, and therefore all must contribute. In the present instance, a compromise was made with the recaptors? Was it for the benefit of all persons concerned in ship, cargo, and freight? for, if it was, it falls within the rule of general average. It appears to me that it was for the benefit of all concerned. It prevented a sale of both ship and cargo, which must have injured all concerned. It would certainly have injured the plaintiff, who had goodson board to a large amount, and he had paid in advance, for the freight of these goods. Of whatever nature the plaintiff's interest was, it was liable to salvage. Sir *William Scott*'s opinion (1) is, that salvage is due, for ship, cargo, and freight. But the defendant's counsel object, that general average never arises but from the voluntary act of man, and here, say they, was no voluntary act; for, salvage was decreed by the Court. This argument is rather too refined. Let us consider it. It is true, that the agency and consent of man, must intervene, to produce a general average; but this agency and consent, though in one sense voluntary, are upon the whole, involuntary. When life is at stake, the mariner willingly

(1) 3 *Rob.* 86.

lingly throws gold and diamonds into the sea. But was he willing to encounter the storm, which produced this dire necessity? General average always arises from actions produced by necessity. In the case before us, there was a capture, re-capture, and decree of salvage. The master and supercargo consented, under these circumstances, to a measure, which produced a general benefit. They surely exercised as much volition, as if they had thrown half the cargo over board in a storm. Suppose they had stood still, and suffered the ship and cargo to be sold, the underwriters would then have had to answer for the *whole freight*. It is better for them to be subject to a general contribution. 1806.

We are of opinion that the plaintiff is entitled to recover on this policy, according to his demand.

Lewis, *Rawle*, and *J. Sergeant*, for the plaintiff.
M'Kean (Attorney-General) and *Ingersoll*, for the defendant.

Donath *et al. versus* The Insurance Company of North America.

THIS cause was argued, in *March* term last, on the following case, stated for the opinion of the Court.

Case. (1) The plaintiffs were in advance for money lent, and goods delivered, to *Don Alvarez Calderon*, according to their account stated, (including commissions and premium of insurance) to the amount of 13,750 dollars; and addressed to the defendants the orders of insurance, dated respectively the 22d of *June* and 6th of *July* 1799, in these words:

"*Philadelphia*, *June* 22d 1799.

"President and Directors of the
"Insurance Company of *North America*.

"GENTLEMEN,

"Agreeably to your answer, we request you to insure 13,750 "dollars, on sundry effects, shipped on board the schooner *Daphne*, "captain *Ripley*, bound for *Havanna*.

"This insurance is declared to be made by us, for and in be- "half of *Don Alvarez Calderon*, king's attorney in the island of "*Cuba*, on goods, or rather effects, they not being merchandize "intended for trade, but wholly his property, consisting in cloth- "ing and wearing apparel, library, a vast quantity of house furni- "ture, coaches, &c. amounting together to 18,733 dollars, of "which we only cover the above sum of 13,750 dollars, the same "being the amount of our advances, inclusive of premium, "commission, &c. at and from *Philadelphia* to *Havanna*, on board

(1) The case was stated with a reference to the various documents, read in evidence; but it is necessary to incorporate the substance of them here, with the statement.

"the

1806. "the *Daphne*, an *American* bottom and property, and the returns "from *Havanna* to *Philadelphia* on board the same schooner or "any other *American* vessel, but if remittance should be made to "us in bills of exchange for the whole or in part of the sum so "insured by us, a return premium of 7½ per cent. shall be allow- "ed us, on the amount that may be remitted in bills.

"We further warrant that *Don Alvarez Calderon* has all neces- "sary passports and protections for himself, suite, and property, "from the *British*, *Spanish* and *French* ministers, which we have "caused to be registered in *Clement Biddle*'s office."

"*Philadelphia, July* 6th 1799.

"President and Directors of the
"Insurance Company of *North America*.

"GENTLEMEN,

"Please to cancel the policy of insurance effected on goods "or effects, shipped by us, on board the schooner *Daphne*, for "account of *Don Alvarez Calderon*, for 13,750 dollars, as the "same have been re-landed and loaded on board the brig *Currier*, "captain *M'Keever*, on which you will please to transport the "same insurance, and on the same conditions.

"*Jos. Donath & Co.*"

Previously to these orders, the plaintiffs had entered into an agreement with *Don Alvarez Calderon*, dated the 11th day of *June* 1799, of which the material passages were these:

"The said *Jos. Donath* & Co. contract to furnish a suitable "vessel for the passage of the said *Don Andres Alvarez Calderon*, "his suite, and goods and effects, from this port of *Philadelphia* "to *Havanna*. To procure insurance to be made of the goods and "effects of the said *Don Andres Alvarez Calderon*, for the said voy- "age, to the amount of commissions, premium and charges, and "the said goods and effects inclusive, and to comprehend in like "manner the sums of two thousand dollars, advanced him by *Ste- "phen Dutilh*, such insurance to be made at and from *Philadelphia* "to *Havanna*, and at and from thence back to this port of *Philadel- "phia*, and the policies of insurance and authority to recover the "same, in case of loss, to remain and be vested in the said *Jo- "seph Donath* and company."

"And the said *Andres Alvarez Calderon* further covenants, "promises and obliges himself to the said *Joseph Donath* and "company, to pay to the said *Joseph Donath* and company, or "their correspondent at *Havanna*, the full amount of said sums "so to be by them advanced, and also for the freight and other "sums to be by him paid as aforesaid at *Havanna*, in specie, to be "loaded on board any vessel at *Havanna* that they may require, "clear of duties or risque, or at the option of said *Andres "Alvarez Calderon*, to pay the said amount in sugars, or other

"produce,

" produce, in which last case, all the freight, charges, commissions 1806.
" at *Havanna*, and risk of the said sugars or other produce of the
" said island of *Cuba*, shall be at the charge of the said *Andres*
" *Alvarez Calderon*, so that the nett proceeds thereof, after de-
" ducting all charges, freight and insurance, as the same shall
" produce at *Philadelphia*, shall be to the credit of said *Andres*
" *Alvarez Calderon*, instead of the sum paid at *Havanna* in specie.
" And it is declared and agreed by the said parties hereunto, that
" in case the said vessel should be captured, taken or lost on her
" said voyage, that the insurance to be recovered on the goods
" and effects, to be shipped and insured as mentioned in the third
" article before mentioned, shall be applied by the said *Joseph*
" *Donath* and company, to the discharge of their advances, and
" in abatement or acquittance for so much of the bills or drafts
" to be drawn by the said *Don Andres Alvarez Calderon* for the
" said sums, so to be paid and advanced for his use by the said
" *Joseph Donath* and company, as aforesaid."

On the 6th day of *July* 1799, *Joseph Ball* duly underwrote the policy for the defendants, and affixed their corporate seal, by which they insured goods on board the *Currier* outwards, and on board her, or any other good *American* vessel home, at and from *Philadelphia* to the *Havanna* and back to *Philadelphia*, valued at 13,750 dollars, for a premium of 20 per cent. The property out was warranted to belong to *Don Alvarez Calderon*; and that he had all necessary passports and protections for himself, suite, and property, from the *British*, *Spanish*, and *French*, ministers, resident in the *United States*. It was, also, stated in the policy, that the property homewards was to be shipped by *Don Alvarez Calderon*, or by his order, for account of the plaintiff; but if the remittance was made in bills of exchange, and not goods, there should be a return of $7\frac{1}{2}$ per cent. of the premium. The premium was duly paid; the warranty in the policy contained was complied with and performed; the policy has always remained in the possession of the plaintiffs; and the goods were shipped and consigned, as specified in the invoice and bill of lading, to wit, by *Joseph Donath* & Co. "for *Don Alvarez* to *Peter Blain*, or his " assigns," at the *Havanna*. On the 19th *June*, and 8th *July* 1799, the plaintiffs wrote two letters to *Peter Blain*, the plaintiff's agent named in the bill of lading, inclosing a copy of the contract with *Don Calderon*, and desiring him to secure payment before the goods were delivered; to which letters they received answers, dated respectively the 18th and 31st of *October* 1799, stating the refusal of *Don Calderon* to pay the drafts, and his desire that the plaintiffs would seek redress from the underwriters. The brig *Currier*, in the policy named, sailed from *Philadelphia*, on the 10th of *July* 1799, on the voyage insured, with the property insured on board; and, while lawfully prosecuting the voyage, to wit, on the 31st of *July* 1799, she was captured by the *British* privateer

1806. schooner *Charlotte*, captain *Thrift*, and carried into *New-Providence*, on the 3d day of *August* ensuing, where *James M'Keiver*, master of the said brig, entered a protest. The brig and cargo were libelled in the Vice Admiralty Court, at *New-Providence*, and were both condemned, except the property in the policy insured, touching which the following proceedings were had at *New-Providence*.

On the 26th of *August* 1799, *Don Calderon* petitioned the Court of Vice-Admiralty, stating that he was possessed of passports from the *British* minister, &c., and praying restitution of his effects. On the 2d of *September*, the Judge pronounced sentence, which, so far as it relates to the present question, expressed a doubt upon the construction of the *British* minister's passport; and directed an inquiry to be made, whether it was the minister's intention to protect the effects of *Don Calderon*, to the extent claimed. (1) On the 12th of *September* 1799, all the goods were restored

(1) The opinion of the Judge of the Court of Vice-Admiralty (Judge *Kelsall*) upon the general character and operation of diplomatic passports, appears sufficiently interesting, to justify its insertion at length.

DECREE. "The only shipment in this vessel, that has occasioned me any "hesitation, is that of *Don Alvarez*. This gentleman is a *Spanish* subject, but "to exempt his property (of the value of eight or ten thousand dollars) from "the usual consequence of capture, he has produced a paper, which has "given rise to no small argument and discussion. It is a letter of licence from "his majesty's ambassador with the *American* states, Mr. *Liston*, by which "the commanders of vessels of war are requested to allow *Don Alvarez* to "pass, with his domestics, baggage, *and effects*. It is said, that this paper, "from its language, not being mandatory, never was designed by Mr. *Liston* "to be viewed as a safe conduct; that it is merely an expression of civility, a "complimentary act, intended to procure to *Don Alvarez* polite treatment, and "to protect himself, servants, baggage, and the customary *viatica*, or articles "necessary for his use during the voyage, and no more; but by no means, to "enable him to carry furniture, carriages, and other goods, to so great an "amount as the property in dispute; that the document is not in the usual "and proper form; and, finally, the right of ambassadors, to protect by their "licences, more than has been here conceded to them, has been contested, on "the ground, that it would defeat the operation of the prize act.

"The safe conduct of ambassadors will not, I apprehend, be often the subject of consideration here; and still more rarely will it happen, that there "will be any greater occasion to dispute, or deny, the privilege claimed, than "there exists in the present. If, however, the right of ambassadors to grant "licences, whereby enemy, or contraband goods, may be protected from capture, during their passage through the sovereign's dominions (which is the case "more especially alluded to by *Blackstone*) (1) or even to the territories of the "enemy, which is the case here, be admitted in its fullest extent; still it must "be granted, that to insure proper respect to his act, attention should be "paid to the forms prescribed or recommended by the writers on the law of "nations; I mean, as *Vattell* expresses it, to enumerate, and categorically express, every thing intended to be comprehended. Here no enumeration has "been made; but, instead thereof, a word has been inserted, of an import so "general, that it may be construed to include any thing and every thing, of any "amount and of any kind.

"I may, I trust, without derogating in the least from the respect due to his "excellency, the ambassador, be permitted to doubt, whether, when he wrote

(1) 1 *vol. Com.* 259, 260.

"the

restored to *Don Calderon*, on his giving security, to abide the final decree, except a trunk of valuable articles, which had been lost after the capture; and for which the judge refused to make the captors responsible. 1806.

The property received by *Don Alvarez Calderon*, in consequence of those proceedings, was carried by him to the *Havanna*, but never delivered to the said *Blain*, in the bill of lading mentioned, nor accounted for to the plaintiffs.

On the 31st day of *August* and the 1st of *October* 1799, the plaintiffs abandoned the property insured to the defendants, stating in the former letter, particularly, that "they had received "orders from *Don Calderon* to do so;" and thereupon demanded payment for a total loss: which the defendants refused to pay, but offered to pay an average loss on the goods damaged and stolen. *Don Alvarez Calderon* has not paid to the plaintiffs the whole, or any part of their advances before mentioned: and no property insured on the homeward passage, has been shipped by him or his order, for account of the plaintiffs, nor hath any part of

"the passport, he really meant to give it the full purport of which it is sus-
"ceptible.

"The situation of Judges of the Vice-Admiralty Courts is well known to "Mr. *Liston*. If, on the one hand, they are bound to respect the right of "ambassadors, there are, also, duties to fulfil towards those who claim the "benefits of the prize act. And hence I do conclude, that in extending the "privileges or immunities of a passport, beyond what is commonly done, he "would have adopted a term of more precise and determinate signification, "than the one he has used. Besides, it is very evident that Mr. *Bond*, the con-"sul, who, I dare say, did see this licence, and who ought, and, I presume, "does, know better than any person here, what the ambassador really intend-"ed, takes no notice whatever of "*effects*," but confines his consular licence, "or pass, which he granted eight days subsequent to that of Mr. *Liston*, to "the persons and baggage of *Don Alvarez* and his servants. *Don Alvarez* "himself, too, by insuring so carefully against capture, seems to have enter-"tained a different opinion of this safe-conduct at *Philadelphia*, from that "which he holds in this place. I will not, though, take upon me to say, that it "is not possible, but that Mr. *Liston* might have been aware of the purpose to "which his passport was intended to be applied; and that he might have "deemed this a fit occasion, for the exercise of the extraordinary powers at-"tached to his station and character. If this prove to be the case, I shall dismiss "the libel, and leave the captors, if they think themselves aggrieved, to seek "redress elsewhere. My duty, therefore, in the first place, is to be satisfied of "what was the ambassador's meaning. For this purpose, I decree, that an "exact enumeration of the articles (exclusive of the baggage, the books, and "every thing necessary for the prosecution of his voyage, which, if it has not "been done, I direct may be immediately given up) that have been shipped "by *Don Alvarez*, be made out, and that it be transmitted to his excellency the "ambassador, with a request that he would certify to this Court, whether any, "or what, things therein specified, were intended by him to be protected from "capture by his licence. In making this enumeration, I trust that the great-"est care will be used to prevent injury; and that the same be done in the "presence of some person appointed by the claimant."(1)

(1) Upon receiving Mr. *Liston's* explanatory certificate, the whole of the property was ordered to be restored absolutely.

the

1806. the remittances in the policy mentioned, been made in bills of exchange.

The questions for the opinion of the Court are,

1st. Whether, under all the circumstances, the plaintiffs had an insurable interest in the property, mentioned in the policy, out and home, or either? 2d. Whether, if they had such interest, it is sufficiently insured by this policy, to entitle them to recover in the present action, as for a total loss? 3d. Whether, if they are not entitled to recover as for a total loss, they are entitled to recover as for a partial loss, and to what amount? 4th. Whether they are entitled to a return of premium on the return voyage, and to what amount?

It is further agreed, that the judgment of the Court shall be rendered by them, in such form and for such sum, if any, as shall be best calculated to effectuate their opinion upon the foregoing questions.

The cause was argued in *March* term 1806, by *Levy* and *Dallas*, for the plaintiffs; and by *Ingersoll* and *Hopkinson*, for the defendants.

For the plaintiffs, it was insisted: 1st. That the advance and lien, gave them an insurable interest in the effects of *Don Calderon*; *Park*, 282. 1 *Bl.* 103. 1 *Burr.* 489. *Park*, 267. 269. 8 *T. Rep.* 154. *Park*, 11. 3 *Burr.* 1410. *Park*, 270. 8 *T. Rep.* 13. 1 *Bos. & Pull.* 315. 323. 216. 6 *T. Rep.* 478. 483. 1 *Marsh.* 81. 91. 111, 112. 2 *Bos. & Pull.* 240. 75.; that the nature of their interest was fully communicated to the defendants; that they had taken every precaution to secure the lien, by retaining the possession of the effects, and consigning them to their agent at the *Havanna*, to be delivered to *Don Calderon*, only upon re-payment of the money advanced; that the capture took from the plaintiffs the possession of the property, and, with it, their lien; thereby constituting a total loss, on which they had a right to abandon; 2 *Burr.* 694. 2 *Emerig.* 188. 194, 5. 3 *Poth. B.* 3. *c.* 3. *art.* 1. *s.* 3. that the restitution to *Don Calderon* was not a restitution to the plaintiffs; but, on the contrary, was destructive of their possession and lien; and that although the goods were, in fact, afterwards carried to the *Havanna* by *Don Calderon*, they were never delivered at the port of destination, to the consignee of the plaintiffs, within the spirit and meaning of the policy, any more than if they had been carried thither by the captors. 2d. That the defendants have virtually acknowledged the right of the plaintiffs to recover, by offering to pay an average loss upon the property damaged and stolen. 3d. That, at all events, the policy contemplates two distinct adventures; to wit, an outward cargo, and a remittance, either in cargo, or in bills of exchange (providing, in the latter case, for an abatement of seven and a half

a half per cent. premium) and as no risque has been run of either kind, upon the return voyage, there should be a proportional return of premium. *Park*, 367. (*5 edit.*) 377, 8. 3 *Burr.* 1237. 2 *Marsh.* 564. 567. 569. 561 *to* 571. 1 *Bos. & Pull.* 172. 1806.

For the defendants, it was insisted, 1st. That their contract was with *Don Calderon*, through the agency of the plaintiffs; that the plaintiffs never had an insurable interest, or, if they had, they have not insured it; for, the insurance is made on the effects of *Don Calderon*, on his account and risque; and although they are consigned to *Blain*, at the *Havanna*, it is expressly "for *Don Calderon*;" 1 *Ld. Raym.* 271. 12 *Mod.* 156. that there was no idea of a lien, in the origin of the transaction, but a perfect reliance on the honour of *Don Calderon*; that although two persons may insure distinct interests in the same subject, it must be upon distinct contracts, and for distinct premiums; and that *Don Calderon*, in case of a legal loss, might have sued on the policy, though he had paid his debt to the plaintiffs; and thus if they might sue, their debt not being paid, two interests would be insured by the same contract, for a single premium. 2d. That the defendants had complied with their contract, the property being restored to, and remaining in, the possession of its owner, for whom the insurance was made, at its port of destination; and that the insurance was against the perils of the sea, and of war, but it was not an insurance against the misconduct of *Don Calderon*, in retaining the property, without paying the debt. 3d. That the voyage was entire; for an entire premium of twenty *per centum*, varying the amount of the premium, but not the entirety of the voyage, according to the manner, in which the returns should be made. *Park.* 440. 377. 2 *Marsh.* 572. *Doug.* 751.

The cause was held under advisement, until the 17th of *January* 1807, when the opinions of the Judges, who had heard the argument, were delivered.

TILGHMAN, *Chief Justice.* My opinion on the first point will be rendered unnecessary, by the opinion which I shall deliver on the second point; because, granting that the plaintiffs possessed an insurable interest, I am of opinion that it clearly appears from the facts stated, that they ordered no insurance, and that no insurance was made for them, in any other capacity, than as agents of *Don Alvarez Calderon*: consequently, they cannot recover for a total loss, as *Don Alvarez Calderon* has accepted that part of the property which was saved, and thereby made his election to claim only for a partial loss. The instructions of the plaintiffs for effecting the insurance, were to insure *expressly for and on behalf of Don Alvarez Calderon.* It is true, they insured only 13,750 dollars, although the whole effects of their principal amounted to 18,733 dollars;

1806. dollars; and they give the reason, that 13,750 dollars covered the amount of their advances, including premium, commissions, &c. The defendants might well suppose, that the plaintiffs were to hold this policy for their own security, in case of loss, although the insurance was made for *Don Alvarez Calderon*; and that this was the fact, appears from the agreement, dated the 11th of *June* 1799. But it is not stated, that this agreement was disclosed to the defendants: on the contrary, there is one circumstance which goes far towards convincing me that no such disclosure was made. It is this: By the agreement, the outward cargo was to be at the *risk of Don Alvarez Calderon*; but the memorandum at the foot of the policy, contains a covenant, that the inward cargo should be shipped on account of the plaintiffs. The plaintiffs contend, that they had a lien on the goods, and that it so appears by the bill of lading, and their letter to Mr. *Blain*. But, in my opinion, those papers prove directly the contrary. By the bill of lading, the goods are deliverable *for Don Alvarez Calderon*, to *P. Blain*; so that *Don Alvarez Calderon* might have compelled *Blain* to give him possession of the goods, before the expiration of the fifteen days, which were allowed for payment of the plaintiffs' demand. The plaintiffs, in their first letter to *Blain*, declare that *the respectability of Don Alvarez Calderon's character* was a sufficient guarantee, for the honourable execution of his agreement. And even in their second letter, although they began to apprehend difficulty from the capricious temper of the Don, they gave no intimation of any expectation, that their agent should hold the goods till he received payment of their demand.

Suppose *Don Alvarez Calderon* had paid the plaintiff's account; can it be contended, that he could not recover for his own use, on this policy, the amount of the loss, that he has actually sustained? And, if he could, does it not inevitably follow, that the plaintiffs cannot recover *for their own use?* If they can, one insurance effected for one premium, may be made to cover two different interests, vested in different persons. Besides, the plaintiffs attempt, most unreasonably, to make the defendants answerable for a risk, which they never meant to run; that is, for the integrity and good conduct of *Don Alvarez Calderon*. And after that gentleman has received the property, which was restored to him by the *British* Court of Admiralty, the defendants are called on to answer for it, as being lost. To render the impropriety of this demand the more complete, the plaintiffs made the abandonment, on which they found their claim, *expressly by order of Don Alvarez Calderon*. Nothing can be clearer than that the plaintiffs, throughout the whole of the transaction of this insurance, acted not for themselves, but as the agents of *Don Alvarez Calderon*.

3d. On the third point there is no difficulty. Undoubtedly, the plaintiffs may recover for the partial loss, sustained by *Don Alvarez*

rez Calderon. The defendants do not deny it. I presume the parties can easily adjust this loss. Indeed, I understood so, from what fell from Mr. *Levy*, in the course of his argument. 1806.

4th. The last question in this case, is, whether the plaintiffs are entitled to a return of any part, and how much, of the premium? The general rule is, that where the voyage is *entire*, and the risk has once *commenced*, there shall be no return of premium. But when, by the course of trade, or the agreement of the parties, the voyage is divided into distinct parts; and, on one of these parts, no risk has been run, there shall be an apportionment of the premium, and part shall be returned. A voyage may be entire, though the ship is to go to a number of different places, and to take in different cargoes. But if, in the contract of insurance, there are certain contingencies introduced, which, at certain periods of the voyage, may operate so as to make the insurance void, it has been considered, that, in such cases, the voyage may be supposed to have been divided, in the contemplation of the parties, into distinct parts. As in the case of *Stevenson* v. *Snow*, which was an insurance of a ship "at and from *London* to *Halifax*, warranted to depart with convoy from *Portsmouth*." The convoy was gone, before the ship arrived at *Portsmouth*; and by the judgment of Lord *Mansfield*, and the whole Court of King's Bench, there was a return of part of the premium. In the case before us, it appears to have been in contemplation of the parties, that on the voyage from the *Havanna* home, there might be contingencies, which would either avoid the policy, for that part of the voyage, or lessen the risk, so far as to require a part return of premium. The goods shipped on the *outward* voyage, are warranted to be the property of *Don Alvarez Calderon*. It was doubtful, whether any goods would be shipped on the *inward* voyage. If a remittance was made in bills of exchange, there was to be a return of seven and a half *per cent.*, part of the premium. If goods were shipped, they were warranted to be on account of the plaintiffs. It seems to be the spirit of this agreement, that the voyage may be divided; and that if no goods were shipped, there should be a return of seven and a half *per cent.*

On the whole of the case, I am of opinion, that the plaintiffs are entitled to recover for a partial loss, and a return premium of seven and a half *per cent.*, with interest from the commencement of the action. I do not think, that they should be allowed interest for a longer time, because they demanded more than they were entitled to, and have put the defendants to the expense of contesting their claim for a total loss.

YEATES, *Justice*, being indisposed, sent his opinion, in writing, to the Court, and it was read by the prothonotary. He concurred in the decision, that the plaintiffs, were entitled to recover a partial loss, for the goods lost and damaged; but he considered

1806. dered the voyage as entire, and, consequently, was opposed to the claim, for a return of premium.

SMITH, and BRACKENRIDGE, *Justices*, concurred, generally, in the sentiments delivered by the Chief Justice.

And judgment was entered for the plaintiffs, accordingly; the quantum to be calculated by the parties. (1)

(1) On the question of interest, *Dallas* took the liberty of suggesting to the Court, after the opinions were delivered, that the practice had uniformly been, to allow interest on the amount actually recovered, upon the expiration of 30 days, after depositing the proofs of loss; and that, on principle, the underwriters could only discharge themselves from interest, or costs, by a tender, or payment into Court, of the sum due. But the Chief Justice answered, that the subject had been considered, and was now decided.

COURT

OF

ERRORS AND APPEALS,

DELAWARE.

THE LIBRARY OF THE UNIVERSITY OF MICHIGAN

September Term 1788.

(1) W. B. Surviving Partner, &c. Appellant, *versus* Latimer, Respondent.

THE facts, arguments, and principles, involved in the discussion of this cause, were stated by the first commissioned Judge, in the following terms:

DICKINSON, *J.* An action of trover was brought by the appellant and his partner, in the Court of Common Pleas, in *Kent*, for the brig *Endeavour* and her cargo. There was a general verdict and a judgment for the plaintiff, in that Court. The cause was then removed into the Supreme Court, by a writ of error, and there the judgment of the Court below was reversed. The appeal, in this cause, is from that judgment of reversal.

Upon the trial, in the County Court, the plaintiff gave in evidence, "that the defendant, as marshal of the admiralty, appointed *Ralph Walker* to take the brig and cargo into his care and "possession; that he did so, and continued possessed thereof "until they were replevied, by virtue of the writ of *replevin*. in "the judgment hereafter mentioned; and that the defendant, by a "warrant in writing, appointed *John Dawson*, deputy-marshal, "&c."

(1) I have been presented with the report of this case, and of the next, by the learned and venerable judge, who pronounced the judgments of the Court; and their intrinsic merit, as well as the respect due to the Judge, must render any apology for their publication unnecessary.

1788. The plaintiff then offered in evidence, the record of an action of *replevin*, brought by him and his deceased partner against the said *Walker* and others, to *February* term 1782, upon which action a judgment was entered, at the same term, by default, for the said brig and cargo. The defendant, by his counsel, objected to the same, inasmuch as he was not a party to the action of *replevin;* but the Court over-ruled the objection. To this opinion of the Court, the defendant's counsel tendered a bill of exceptions, that was sealed by the Judges, in which the facts beforementioned, were stated.

Upon the same trial, the defendant gave in evidence, "the transcript of the proceedings in the Court of Admiralty, by which "it appeared, that the brig *Endeavour* and her cargo, had been "condemned in the said Court, as lawful prize, to, and for the "use of, the captors, and had been sold by the defendant, as "marshal of that Court, under that decree. The plaintiff, by "his counsel, objected to the operation of said condemnation, "inasmuch as the said Court of Admiralty had not jurisdiction, "the said brig and cargo being taken and seized, as prize, at "*Whitehall* landing, in *Little Duck* creek, in the body of *Kent* "county, and belonging, at the time of seizure, to citizens and "inhabitants of the said county, which objection, the Court held "to be sufficient, for the causes above stated." To this opinion of the Court, the defendant's counsel tendered a bill of exceptions, afterwards duly sealed, in which the particulars, before recited, are set forth.

The capture was made, during the late war, in *December* 1781. It is contended, by the counsel for the appellant, "that the action, in this case, against the officer of the Court of Admiralty, "is maintainable, and two principal points are insisted on: 1st. "That the Court of Admiralty *had not* jurisdiction; and, 2d. That "if that Court *had* jurisdiction, yet the judgment in *replevin*, subsequent to the decree of condemnation, is an affirmance of property in the appellant, of which, as such an affirmance, we are "bound to take notice, and thereby to be concluded."

With respect to the *first principal* point, it is urged, "that the "Admiralty had not jurisdiction by any *principle of law*, because "its jurisdiction extends only to acts done upon the high seas; "and, in cases of capture, is governed by *the law of nations*, "which can apply *only* to questions between citizens, or subjects, "of *different* states, or kingdoms; that it had not jurisdiction "under any *resolutions of congress*, because they do not reach to "the present instance; that there was but a bare *intent* to offend; "and that the legislature of this state had directed *a particular* "*mode of proceeding*, in every such instance, by the act of assembly passed on the 20th day of *May* 1778."

A great number of cases has been read, in order to show that the jurisdiction of the Admiralty, extends only to acts done upon

upon the high seas. The same answer may serve for every one of them; they all relate to causes *civil and marine*, and not to causes of *prize*. The question, "prize, or no prize, belongs to the "jurisdiction of the Admiralty, whether the capture be upon the "high seas, in ports, rivers, *or within the body of a county*." It is not necessary to inquire how far this doctrine may be extended. The cause now to be determined, is of a capture upon a navigable water. The decisions in the cases of *Le Caux* v. *Eden*, *Lindo* v. *Rodney and another*, *Brown and Burton* v. *Francklyn*, and *Key and Hubbard* v. *Pearce*, have removed every doubt upon this head. 1788.

The other branch of this objection is, "that, in cases of cap- "ture, the Admiralty is governed by *the law of nations*, which "can apply *only* to questions between citizens or subjects of *dif-* "*ferent* states or kingdoms."

The law is as clear upon this, as upon the former, part of the objection.

Whether it be, that, *in time of war*, the usual forms cannot be observed; or, that persons, engaged in enterprises favourable to enemies, are considered as connected with them in councils and interests; or that, as the welfare of a society depends on the issue of the war, therefore, the endeavours of the well affected, amidst uncertainties and dangers, to guard the public happiness, give a peculiar sanction to their exertions, it is evident that, upon captures *as prize*, the admiralty proceeds against the property taken, though it belongs to citizens or subjects of the state or kingdom, by the authority of which the Court is established. If this rule be deemed essential to the general weal, in common wars, arising, perhaps, from disputes about borders, distant territories, or commercial benefits, how much more occasion is there for such vigilance and strictness, in a war like the last, a war of invasion, piercing into the heart of a country, and involving in its event, the freedom of a whole people, and their posterity.

In the cases before referred to, not to mention any more, *Brown* and *Burton* were *English* subjects, and *Key* and *Hubbard*, *Le Caux* and *Lindo*, were *British* subjects.

Thus that law, from which our jurisprudence is derived, (2) stands established, by a multitude of judicial determinations, for several ages. The Courts of Admiralty, in these states, proceed in the same manner. The Court of Admiralty, in this state, condemned a vessel, taken in *Jones's* creek, *within the body of Kent county*, and *belonging to an inhabitant thereof;* (3) yet no objection, that

(2) By the 25th section of our constitution, "the common law of *England*, "and so much of the statute law as has been heretofore adopted in practice, "shall remain in force, unless they shall be altered, &c."

(3) The facts here mentioned, that the vessel was taken in *Jones's* creek, *within the body of Kent county*, and *belonged to an inhabitant thereof*, were stated in the libel of *Barret* and others.

we

1788. we have ever heard of, was made to the jurisdiction of the Admiralty.

Here it may be proper to recollect, that, in the present instance, the Court of Common Pleas expressly held the objection of the appellant's, then plaintiff's, counsel, against the operation of the condemnation in the Admiralty, "to be sufficient, *because* that "Court *had not* jurisdiction, *inasmuch* as the brig and cargo were "taken and seized as prize, at *Whitehall*, in *Little Duck* creek, "*in the body of Kent county*, and *belonging*, at the time of seizure, "*to citizens and inhabitants* of said county."

The next allegation of the counsel for the appellant is, "that "the Court of Admiralty had not jurisdiction under any resolu- "tions of congress;" particularly referring to those of the 25th of *November* 1775, and the 23d of *March* 1776.

The second of the resolutions, in *November*, provides, that "all "transport vessels, in the *British* service, &c. and all vessels, *to* "*whomsoever belonging*, that shall be *employed in carrying pro-* "*visions*, &c. to the *British* army or navy, &c. shall be liable to "seizure, and, with their cargoes, shall be forfeited." By the fourth, it is "recommended to the legislatures of the *United* "*Colonies*, to erect Courts of justice, or give jurisdiction to the "Courts now in being, for determining concerning the captures "to be made as aforesaid, all trials in such cases to be had, *by a* "*jury*, &c." By the fifth, "all prosecutions *shall be* commenced "in the Court of that colony, *in which* the captures shall be "made; but if no such Court be, at that time, erected, in the "said colony, or if the capture shall be made *on open sea*, then "the prosecution shall be in the Court of such colony as the "captor may find most convenient, &c." By the sixth, "an ap- "peal, *in all cases*, shall be allowed to congress, or such persons "as they shall appoint, &c."

By the fifth of the resolutions, in *March*, it is determined, "that all vessels, &c. belonging to the inhabitants of *Great Bri-* "*tain*, as aforesaid, and *all vessels*, *which may be employed in* "*carrying* supplies to the ministerial armies, which shall happen "to be taken *near the shores of any of these colonies*, by *the peo-* "*ple of the country*, or *detachments from the army*, shall be "deemed lawful prize; and *the Court of Admiralty*, within the "said colony, is required, on the condemnation thereof, to ad- "judge payment of charges, and distribution, &c."

It is said, "that if the words '*all vessels*,' and '*all vessels to* "*whomsoever belonging*,' can be construed to extend to vessels "owned by inhabitants of the *United States*, then colonies, yet "the first set of resolutions, wholly respects a condemnation "*upon trial by jury*,' and the second set, captures '*near the* "*shores of any colony*,' circumstances very different from those "of the present instance; and both sets have regard, solely, to

"*vessels*

"*vessels employed in carrying*, &c." though here, at most, was "*only a design* of carrying." 1788.

The best way of discovering how far arguments, deduced from resolutions of congress, can be applied on this occasion, will be, to consider them, not separately, but conjointly, as forming a system, that existed in force at the time of the transaction.

On the 8th of *January* 1780, long before the capture of the *Endeavour*, it was resolved, by congress, "that the trials in the "Courts of Admiralty, in cases of capture, be according to the "*usage of nations*, and *not by jury*." It does not appear that any other material part of the foregoing resolutions in 1775 and 1776, was repealed. Therefore, the powers intended, in those resolutions, to be exercised by the Courts of Admiralty, remained. Only the mode of exercising them was altered. The obligation of any of these resolutions has not been, and will not be, denied. Of course, the exception taken to the resolution of 1775, does not, in any manner, impeach the regularity of the proceedings in this cause.

As to the exception, founded upon these words, in the resolutions of 1776, "*near the shores of any of the colonies;*" (4) it would be a very singular distinction, if vessels, engaged in hostile projects, should be liable to seizure and condemnation, below the mouth of a river or creek, and should gain protection, by entering into it for the very purpose of more effectually carrying them on; especially if it be considered that congress certainly intended the resolutions of 1775, and 1776, to agree and co-operate. They did not undertake to say, that "the *shores*" of any colony, were the *limits* of that colony; and they expressly speak, in the 5th resolution of 1775, of captures made "*in*" a colony.

The exception taken against both sets of resolutions, states, that "they have regard solely to *vessels employed in carrying*, &c. and that here, at most, was *only a design* of carrying;" or, in other words, that the offence was not committed, but only intended. (5)

On the other hand, it is set forth by the judge in his decree, that the fixed design of the appellant and his partner, through all the transactions relating to this vessel, was to carry her and her cargo to *New-York*, then in the possession of the *British* fleet and army; and that they had obtained a passport from the admiral, who was there, for this purpose; and it appears, from the plea and answer of the appellant, in the Court of Admiralty, and from other parts of the proceedings, that the brig *Endeavour* had

(4) The libel of *Barret* and others, against the vessel taken in *June* 1778, and afterwards condemned, stated, that she was taken "*in Jones's creek, and* "*near the mouth thereof, in Kent county.*" This libel, also, set forth the resolution of congress on the 23d of *March* 1776, as the foundation of the prosecution.

(5) The intention of supplying an enemy, manifested by such circumstances as in this case, is clearly criminal at common law. *Foster*, 217.

been

1788. been purchased at *Lewes-Town*, brought into *Little Duck* creek, as far up as *Barker's* landing, had there received a considerable part of her cargo, and then went down several miles to the place where she was captured. If she was going to *New-York*, surely she was "*employed in carrying* supplies to the *British* army."

This point has been deemed very important, and many ingenious arguments have been offered upon it. One remark may, perhaps, throw some light upon the subject.

Whether the *Endeavour* was "*employed in carrying* supplies "to the *British* army," is a question of *fact*. This Court is now sitting to correct *errors in law*, "as was allowed under the old "government in the last resort, to the king in council." (6) The cause now depending, comes before us, after a removal into the Supreme Court, by a writ of error, upon a general verdict, and a judgment thereon below. Must there not be some great deviation from legal principles, in the method proposed for the decision of this business, since it leads to so extraordinary a conclusion, that, instead of being judges to determine what the law is, we are in a case thus circumstanced to become an imperfect jury, for the re-trial of a matter of fact?

The last objection of the appellant's counsel, comprehended in the first principal point, is, "that the legislature of this state, has "directed *a particular mode of proceeding*, in every such instance "as the present, by an act of assembly, passed on the 20th day of "*May* 1778."

By that act, "all provisions and supplies loaden on board any "vessel, or other carriage, in any place or port within the state, "to the intent. &c. to be conveyed, &c. to, or from, the enemy, "&c. shall be forfeited, with the craft, &c. carrying the same, to "the use of the captors; and two justices of the peace, of the "county where such capture happens, may adjudge a forfeiture, "and order sale, &c."

Proceedings have been, accordingly, had, at least, in one instance, at *New-Castle*, in *July* 1782.

At the time of making this law, the Court of Admiralty was subsisting in this state. Public acts, and dates, may here be material. In less than four months after the resolutions in *March* 1776, the declaration of independence was made. In less than three months from that time, with the same spirit of federalism, that has, on so many occasions, directed the conduct of this state, (7) our constitution was framed, candidly recognizing the authority of "resolutions of congress," and, among other things, requiring "a judge of admiralty." A judge was soon after appointed. It is not to be supposed, that in the long interval, between *November* 1775, when congress recommended the estab-

(6) Words of the act of assembly establishing the Court of Appeals.

(7) The constitution was agreed to, the 10th of *September* 1776.

lishment

lishment of Courts, for condemnation of captures, taken in any part of united *America*, as well as elsewhere, till *May* 1778, when this act of assembly was made, there was no Court here, vested with correspondent powers. The Court of Admiralty had cognizance in such cases. Principles of law, and the circumstances of our situation, required that it should have cognizance. 1788.

In that act are no words that positively, or by necessary implication, take away any authority, then existing in another tribunal. The general assembly might think it adviseable, in aid of that authority, to diffuse the jurisdiction, given by the act, throughout every part of the state, among the justices of the peace, as the offences might be numerous, and it would, sometimes, be exercised upon occasions of very trifling moment. The law is clear, that where a Court has jurisdiction in certain cases, and afterwards jurisdiction therein is given to another Court, this provision is only cumulative, not privative; it does not abrogate the authority of the first; but both have a concurrent jurisdiction. *Black.* 89, 90.

There was another question, moved in the course of argument, that seems not properly referable to either of the two principal points before mentioned. Several cases were produced to show, that "it is necessary in every suit in the Admiralty, *to allege in* "*the libel*, that the cause of action arose upon the high seas."

One distinction solves all difficulties on that question. In causes civil and marine, such an allegation may be necessary; in causes of prize, it is not. *Douglas.*

Thus far, induced by particuliar considerations, have we pursued the way marked out by the appellant's counsel, for examining this cause, of much importance, and of the first impression, among us. Where does it begin, and to what does it lead? From a supposed right, in a Court of common law, of scrutinizing, in an action of trover, a decree of the Admiralty, in a cause of prize, after execution; to a power of reversing it in effect.

Not a case has been produced, by the learned counsel, to support this doctrine. It has been said, indeed, that "the capture, "being within the body of a county, is properly triable in a Court of common law, especially where only citizens are concerned."

There is no difference of this kind, upon captures as prize. It is well known with what vigilance the judges in *Westminster Hall*, have watched the admiralty jurisdiction, and with what vigour they have checked it, when unduly exercised. Yet, for this purpose, they never availed themselves of the circumstances now suggested. Besides, there are causes, triable by jury, that originate out of the county, and out of the state, in which the trial is had. Where, then, is their power, in causes of prize, to stop? Is it likely that more respect will be paid to the sentence of another Court of Admiralty, than to that of our own? And ought not the complaint

1788. complaint of a stranger, a neutral, a friend, to be as much regarded in our Courts of justice, as that of an inhabitant?

If once such a contest shall be opened, between the jurisdiction of admiralty Courts of prize, and that of common law Courts, Courts founded upon different principles, and governed by different codes, it would be almost impossible to describe the confusions, and mischiefs, that must inevitably follow.

The evil will appear to be still increased, if it be considered that this contest would be carried on, by a number of common law Courts, in *several states*, against an admiralty jurisdiction, necessarily blended with the very nature of their *federal union*. (8) The law delights in certainty and quiet, because without these, there can be no liberty.

Much has been said in praise of trial by jury, and as much against admiralty Courts, "in each of which," it has been alleged, "a single judge presides, who may draw actions into his juris-"diction, by giving them what name he chuses, and decree in "them as he pleases."

If any citizen of *United America*, does not value trial by jury, at its justly high worth, he is incapable of duly estimating any of his political rights. But if, by the constitution and laws of our country, a jurisdiction is to be exercised in another manner, it is our duty to observe the constitution and laws, without perplexing ourselves by reflections on the excellency of trial by jury.

Congress, after the experience of several years, found it requisite to resolve, that trials in the admiralty Courts, in cases of captures, should not be by jury. And it is to be noticed, that the act of assembly, under which, it is contended, by the appellant's counsel, that this cause ought to have been tried, gives neither trial by jury, nor an appeal. (9)

Our constitution requires, to use its own words, "the ap-"pointment of *a judge* of admiralty." Our laws acknowledge his authority. Such a jurisdiction was established, throughout the *British* parts of this continent, before the revolution, and exists in every christian maritime state and kingdom in *Europe*. The case, the cautions, the dispatch, under this jurisdiction, are attended, in time of war, with great benefits to captors, claimants, and all parties concerned.

(8) This is evident from the confederation: and, before that was completely ratified, commissions to vessels of war, and instructions, were issued *by congress*, bonds were given *to them*, and appeals were reserved *to them*. These powers rested upon the same principles with those, by which congress was authorised to begin, and prosecute, the late war throughout its various operations. To question the validity of those powers, would seem, plainly, to impeach the justice of those operations.

(9) There was a condemnation, without trial by jury, of the vessel taken by *Philip Barret* and others, in 1778.

Admitting

Admitting the government of a free state, to be so degraded, that the "judge of the admiralty appointed by the joint ballots of "the president and general assembly," as he is in this state, wants the integrity and knowledge he ought to possess, yet his irregularities are subjected to an immediate and effectual correction: for, by the resolves of congress, *an appeal* is given to that body, or to the persons by them delegated. 1788.

When, to the care of that assembly, under Providence, the inhabitants of these states committed their liberties, lives, and fortunes, surely there is no impropriety in supposing, that they might safely have been trusted to decide on such a case as the property of the *Endeavour* and her cargo. Yet this plain and easy method of obtaining redress, if any injury had been done, a method agreed to, upon the maturest deliberation, by *United America*, has been declined, and the Courts of common law, *in this state*, are to be engaged in trying causes of prize.

Let us now attend to the sentiments of judges, (10) eminently distinguished for their abilities and learning upon this subject.

"The admiralty has jurisdiction, not only of the question, "*prize, or no prize*, but of *all its consequences:* this jurisdiction "belongs to the admiralty, *totally and exclusively;* and the "Courts of common law have no jurisdiction at all, in such "questions."

"Though for taking a ship on the high seas, trespass would "lie, at common law, yet, when taken *as a prize*, though taken "wrongfully, though it were acquitted, and though there were "no colour for the taking, the judge of the admiralty, was judge "of the damages and costs, as well as of the principal matter; "and if such action should be brought at common law, on plea "of not guilty, the plaintiff could not recover."

"It is true, the sentence of acquittal, in the admiralty, is *con-* "*clusive*, that the ship *was not lawful prize:* but it is *evidence of* "*a thing, which a Court of common law cannot inquire into.* If "the original taking be not a trespass cognizable at common law, "the sentence of the admiralty Court cannot give a jurisdiction "to a Court of common law which it had not before." *Douglas.*

"The *validity* of a sentence, by a Court of admiralty, *in a* "*cause of prize, is not determinable* by the common law." *Saunders, Redley, and Dalbow* v. *Egglesfield and Whitall.*

Though the superior Courts of common law, so strictly superintend the conduct of the admiralty, yet, "there is not one in- "stance where a prohibition was ever granted *in a cause of* "*prize.*" The case of *Brown and Burton* v. *Franklyn*, in the time of *William* the third, is remarkable in this respect. On motion for a prohibition, the plaintiffs suggested, that the defendant,

(10) *Hale, Holt, Lee, Mansfield, Buller,* with the unanimous assent of their brethren, the other judges.

1788. being the king's proctor, had libelled in the admiralty concerning a ship and cargo, &c, whereas the ship was a wreck in the *East-Indies*, and that there had been a sentence in the admiralty that all was prize; and that, upon this sentence, the defendant libelled against the plaintiffs, charging them with embezzlement, &c. *The Court inclined*, that the plaintiffs ought to have an opportunity *to be heard*, and *to controvert the matter of fact;* but, after hearing Dr. *Lane*, a civilian, and considering that, *upon an appeal*, the appellants would be let in to *controvert the right*, and to *disprove the prize;* and that *prize, or no prize*, was a *matter not triable at common law*, but *altogether appropriated to the jurisdiction of the admiralty*, the prohibition was denied." *Carth.* 398. 474.

"The question, *prize, or no prize*, is the boundary line." "The true reason why the jurisdiction is appropriated to the "admiralty, is, that *prizes* are acquisitions *jure belli*, and *jus belli* "is to be determined by the law of nations, and not by the par- "ticular municipal laws of any country."

"The jurisdiction of a Court of admiralty, generally, is limit- "ed to matters *arising upon the high seas*, and is, in that respect, "local: but it is not so in cases of prize; for, in them, the ju- "risdiction does not depend on the *locality*, but *the nature, of* "*the question*, which is such as is not to be tried by *any rule of* "*the common law*, but by a more general law." *Douglas.*

If the *validity* of a sentence by a Court of admiralty in a cause of prize, *is not determinable* by a Court of common law; if even *after an acquittal* by the admiralty, *declaring a ship to be no prize*, an action, at common law, is not maintainable for *the capture*, or for *any transaction in consequence of it*, certainly the proceedings in the Court of Common Pleas, are not warranted by law.

We now proceed to the *second principal point.*

It is contended, by the counsel for the appellant, "that if the "Court of admiralty *had* jurisdiction, yet the judgment in *re-* "*plevin* being subsequent to the decree of condemnation, is an "affirmance of property in the appellant, of which, as such an "affirmance, we are bound to take notice, and thereby to be con- "cluded."

As this assertion, if well founded, will be productive of very important effects, it deserves a strict investigation.

If the Court of Admiralty had jurisdiction of *the original cause*, that is of the capture as prize, it is equally plain, from the books, that it had jurisdiction of *all consequences*, to the exclusion of every Court of common law. The action of *replevin* for the *Endeavour* and her cargo, ought not, therefore, to have been brought. The Court of Common Pleas had no jurisdiction in the case. Again; if the Court of Admiralty *had* jurisdiction, an injury was done to the respondent, by the determination of the Common Pleas, that the Court of Admiralty *had not* jurisdiction;

tion; and if, by the judgment in *replevin*, we are estopped from relieving him, though he applies to us for relief, in a legal manner, here is an injury that must forever remain without a remedy; which the law justly abhors. 1788.

These irregularities may be set right, by a due arrangement of the several parts of this cause. On the trial, in the Common Pleas, the respondent tendered two bills of exceptions. In one of them, he objected to the record, in the action of *replevin*, being given in evidence against him, "*inasmuch as he was not a party* "*to the same: but the Court over-ruled the objection.*" On this point, their judgment, supposing they had jurisdiction, appears to have been regular. In the other, he objected to the decision of the judges, that "*the Court of Admiralty had not jurisdiction.*"

These bills are separate. These objections are distinct. If, on either of them, an erroneous decision was given, wrong was done to the respondent, or, to express it in other words, *that was dealt out to him for law, that was not law:* yet, it is urged, by the appellant's counsel, that they ought to be so considered together, as utterly to deprive the respondent of all benefit by the last. (11)

The question before us, is not, whether a judgment by default in *replevin*, is an affirmance of property: but, whether, in the present instance, we are obliged to consider it as such an affirmance.

The judgment in *replevin*, was merely a piece of evidence given to the jury. It had its effect, mingled with other evidence, in the general verdict. It is impossible for us, with any respect for substantial justice, to separate it from the other evidence, shut up in that verdict, because it is impossible for us to determine, what effect the proceedings, in the Court of Admiralty, would have had upon the jury, if the judges of the Common Pleas had not condemned them by deciding, that "*the Court of Admiralty* "*had not jurisdiction.*" In what inextricable confusion should we involve the merits of this cause, by regarding the judgment in *replevin*, as an affirmance of property in the appellant, superseding every other consideration?

The question before us, on this point, finally resolves itself into the same that was before the judges of the Common Pleas, that is, whether the judgment in replevin, was regularly admissible as evidence, "*inasmuch as the respondent was not a* "*party to it*," not, *what was its legal operation on the property in contest.* The law is clear, that "a bill of exceptions is not to "draw the whole matter into examination again. It is only for "a single point." (12)

Not

(11) If, upon a trial, a party takes several bills of exception; and, upon a writ of error, succeeds in supporting only one of them, the judgment below is to be reversed, because he was injured by this decision against him, though he was not by the rest.

(12) "Evidence is to be given in open Court, in the presence of the parties, "their attornies, the counsel, and all by-standers, and before the judge and "jury;

1788. Not one case has been produced, by the learned counsel for the appellant, to show, that, upon a bill of exceptions to another point, and after a general verdict, we are bound to consider a judgment by default in *replevin*, brought before us, as this is, as an affirmance of property; though struck with the position, we desired that such a case, if to be found, might be produced. Not a case has been offered, that can, by any analogy, be made to maintain the inference drawn in behalf of the appellant.

The judgment of the Supreme Court affirmed.

Robinson *et al.* Appellants, *versus* The Lessee of Adams, Respondent.

AN action of trespass of ejectment, was brought, by the respondent, against the appellants, in the Common Pleas, of *Sussex*, for a tract of land situated in that county. The action was removed into the Supreme Court, by *certiorari;* and, upon the trial there, the jury found a special verdict.

The verdict states, 'that *Thomas Bagwell* was seised in his "*demesne* as of fee, of a moiety of a tract of land, called *Long-*"*Neck*, of which the land in question is part, and, by his will, "dated the 15th day of *April* 1690, devised the same in manner "following: 'I *Thomas Bagwell*, &c. for my worldly estate, that 'the Lord hath endowed me with, do give and bequeath as fol-'loweth: *Item*, I make my dear wife the executrix. *Item*, I give 'to my two sons, namely, *William* and *Francis*, all my land at 'the *Horekiln*, in *Sussex* county, &c. to be equally divided be-'tween them, and their heirs, forever. *Item*, this plantation, 'where I now live, &c. I give to my son *John*, to him, his heirs 'forever; that is, from a white oak, by the creek side, &c. to 'the head line. *Item*, I give to my son *Thomas*, the rest of my 'land here, to be equally divided, and he to have share in the 'orchard; and, likewise, my part of the cedar island, I give to '*Thomas* and *John*, to be equally divided between them, to them 'and their heirs forever; only my two daughters, namely, *Ann* '*Bagwell* and *Valiance Bagwell*, to have an equal share of the 'said island, so long as they keep themselves unmarried, and no 'longer. *Item*, I give to my son *Thomas*, two hundred acres of 'land, adjoining *William Burton's* branch, to him and his heirs 'forever. *Item*, I give to my son *John*, one negro woman.

"jury: each party having liberty to except to its competency, which excep-"tions are publickly stated, and, by the judge, are openly and publickly al-"lowed, or disallowed, in the face of the country; which must curb any secret "bias or partiality that might arise in his own breast. If, either in his direc-"tions, or decisions, he mis-states the law, by ignorance, inadvertence, or de-"sign, the counsel, on either side, may require him, publicly, to seal a bill of "exceptions, stating the point wherein he is supposed to err." 3 *Blackstone*, 372. *Buller*, 310.

'*Item*,

'*Item*, I give to my daughters, *Ann* and *Valiance*, two hundred 1788.
'twenty and five acres of land, adjoining *John Abbot*, *Thomas*
'*Mills*, and *Francis Wharton*, to them and their heirs forever.
'If any one of my aforesaid children should die, before they
'come to lawful age, their lands to go to the survivors; that is,
'if *Thomas* should die, before he comes to lawful age, I give his
'share of land where *William* now lives, to my daughter *Eliza-*
'*beth Tilney*, to her, and the lawful begotten heirs of her body,
'forever; provided *Thomas* have heirs before he comes to law-
'ful age, then to him, and his heirs, forever: and, likewise, if
'*William* should die without heirs, to go to *Francis*; and if *Ann*
'should die without heirs, to go to *Valiance*; and if *John* should
'die before he comes to lawful age, without heirs, then his share
'of land here, where I now live, I give to my daughter *Comfort*
'*Leatherberry*, to her, and her lawful begotten heirs of her body,
'forever. *Item*, I give to every one of my grand-children a calf,
'to them, and their heirs, forever; to my daughters *Ann* and
'*Valiance*, a feather bed a-piece, to them, and their heirs, forever;
'to my four sons, *Thomas*, *William*, *Francis*, and *John*, a gun
'a-piece, to them, and their heirs, forever; to my son *Thomas*,
'my pistols and holsters, forever, &c. And all the rest of my
'personal estate, I give to my wife, and my six aforesaid chil-
'dren, to be equally divided among them, to them, and their
'heirs, forever; to wit, *Thomas*, *William*, *Francis*, *John*, *Ann*,
'and *Valiance*. I set my boys at age at eighteen, and my girls at
'sixteen; and their estate to be divided presently after my de-
'cease, by my friends *William Curtis*, *William Burton*, and *Wil-*
'*liam Parker*, which I leave overseers over my children, &c.'
" That the testator died, seised as aforesaid; that his will was
" duly proved, the 16th of *September* 1690; that he left issue, all
" his sons and daughters before mentioned; that after his death,
" *William*, his eldest son, entered into the premises, in the decla-
" ration of the plaintiff mentioned, and being thereof seised, died
" intestate, leaving issue *William*, his only son, by one venter, and
" *Agnes*, his only daughter, by another venter; that the said
" *William* and *Agnes*, after their father's death, entered into the
" premises, of which he died seised, and made partition, as by
" the records of the Orphan's Court appeareth, and the lands in
" the declaration mentioned, were allotted to the said *William*,
" the son, who died intestate, seised thereof, leaving two daugh-
" ters, *Patience* and *Elizabeth*, and a widow, *Ann*; that the said
" *Ann*, as tenant in dower, and the said *Patience* and *Elizabeth*,
" as heirs of the said *William*, entered, and were seised, &c.;
" that the said *Patience*, and *Elizabeth*, died without issue; that
" their mother, *Ann*, married *Benjamin Burton*, and died, leaving
" issue by him, two daughters, *Ann*, and *Comfort*, who entered,
" and were seised, &c.; that the said *Ann* married *Thomas Ro-*
" *binson*, and died, leaving issue, the appellants; that *Comfort*
" died

1788. "without issue; that *Agnes*, the daughter of *William Bagwell*, "the first, married *John Adams*, by whom she had issue, seve- "ral children, of whom *John Adams*, the lessor of the plaintiff, "is the eldest son, and heir at law; that he entered and demised, "&c. upon whom the defendants entered, &c. But, whether "upon the whole matter, &c. the jurors doubt, and pray the "opinion of the Court, &c. And if, &c. they find for the plain- "tiff, and assess damages, to five shillings and six pence for costs, "besides the costs expended: but if, &c. they find for the de- "fendant."

Upon this verdict, the Supreme Court, in *April* 1787, gave judgment for the plaintiff, from which judgment the defendants appealed. An *habere facias possessionem* was awarded to issue, for delivering possession to the plaintiff, upon security tendered, &c.

It is stated, by the counsel on both sides, that the only question in this cause is, whether *William Bagwell*, the son of *Thomas Bagwell*, took, under his father's will, an estate in fee simple, or an estate in fee tail. If he took an estate in fee simple, then, by our intestate acts, that estate is vested in the appellants. If he took an estate in fee tail, the land in question descended to the lessor of the plaintiff, now respondent, the heir in tail.

It is time that this controversy should be finally decided, or, large as the contested property is, it may prove ruinous to all persons concerned. We are informed, that several suits have been brought, for this estate; verdicts given against one another; and contradictory opinions, of very eminent lawyers, in several parts of *America*, obtained. The present action has continued above fifteen years.

It is contended, by the counsel for the appellants, that *William Bagwell*, the devisee, took an estate in fee simple, subject to an executory devise, to *Francis Bagwell*, contingent on *William's* dying under age, and without issue.

Their argument opened with an observation, that "estates in "fee tail are no favourites of the law, and particularly ought "not to be so, under republican forms of government, so that if "there be any doubt in this case, the determination should in- "cline rather towards the appellants, than the respondent." (1)

"The

(1) It is greatly to be desired, that the persons appointed by our Courts, for viewing and dividing lands among the children of intestates, would not suffer themselves so easily to be prevailed upon to report, that the lands will not bear a division. Thus, very often, an estate is adjudged, as incapable of division, to one of the children, that might well be divided into five or six, if not more, farms, as large as many in the eastern states, upon which the industrious and prudent owners live very happily. By the usual way of proceeding among us, one of the children is involved in a heavy debt, that frequently proves ruinous to him; or, if the debt of valuation is paid to the other children, it is in a number of such trifling sums, and at such distances of time, one from

"The intention of the testators," say the counsel for the appellants, "ought to prevail in the construction of wills; that these "are presumed to be made in extreme weakness, and without "good advise; that, therefore, great indulgence has been shown "to improprieties of expression; and judges have frequently "added, subtracted, changed, and transposed words; that, ac- "cording to this rule, these words in the will, 'and, likewise, if 'William should die without heirs, to go to *Francis*,' should be "read thus: 'and, likewise, if *William* should die, *before he comes* 'to lawful age, without heirs *of his body*, *his estate* to go to 'Francis;' that this alteration is agreeable to the meaning of the "testator, because, after having just before mentioned his chil- "dren, and *William* amongst them, he says, 'if any one of my 'aforesaid children should die, *before they come to lawful age*, 'their lands to go to the survivors;" and then, immediately, pro- "ceeds, binding this part and the following into one sentence, "by these strongly connecting explanatory words, 'that is, if 'Thomas should die before he comes to lawful age, I give his 'share of land, where *William* now lives, to my daughter *Eliza-* 'beth Tilney, to her, and the lawful begotten heirs of her body, 'forever; provided *Thomas* have heirs before he come to lawful 'age, then to him, and his heirs, forever; *and, likewise*, if *Wil-* 'liam Bagwell should die without heirs, to go to *Francis*, &c.' "that this construction is consistent with the design of the tes- "tator, expressed in the foregoing part of his will, where he "gives *William* an estate in fee simple; that this estate, being "given to the testator's immediate heir at law, ought not to be "diminished by the following words, unless they necessarily re- "quire it so to be; that they do not thus require it to be dimi- "nished; that all the different parts of the will are reconcileable; "that there was a fee simple given to *William*, with an execu- "tory devise over to *Francis*, upon the contingency of *William's* "dying before he came to lawful age, and without heirs of his "body; that the contingency never happened; but *William* died "seised of the fee simple."

1788.

Many authorities have been read, and ably applied, in support of these principles.

By the counsel for the respondent, it is urged, "that the con- "struction contended for, on the other side, is arbitrary and in- "admissible; that there is plainly an estate in fee tail, given to "*William Bagwell*, because, it is impossible, as was conceded

from another, that they are of very little use to those who receive them. This matter deserves very serious consideration.

It is much to be wished, that every citizen could possess a freehold, though some of them might happen to be small. Such a disposition of property cherishes domestic happiness, endears a country to its inhabitants, and promotes the general welfare. But, whatever influence such reflections might have upon us, on other occasions, they can have little, if any, on the present, for reasons that will hereafter appear.

"by

1788. "by the counsel for the appellants, that he could die 'without 'heirs,' as long as his brother *Francis*, to whom the limitation "over is made, was living; and, therefore, that limitation de- "monstrates, that by the words 'without heirs,' was meant, 'without heirs *of his body*;' that there is no necessity for over- "throwing the fee tail, thus evidently limited; that the words, 'if any one of my aforesaid children should die, before they come 'to lawful age,' &c. were proper, if only some of them were "under age; that there is reason to believe, from the facts "stated, of *William's* being the eldest son, and of his living by "himself; and, more especially, from the words made use of in "the limitation over upon his death, in which there is no men- "tion of his 'dying before lawful age,' that he was of age at "the making of the will; that this construction is confirmed by "the limitations over upon the deaths of *Thomas* and *John*, "which are expressly made to depend not only upon their 'dying 'without heirs,' as with respect to *William*, but, also, upon their 'dying before they come to lawful age;' that these words are "omitted again, in the limitation over upon the death of *Ann*, "and, in all probability, for the same reason; that the testator "has, in this manner, repeatedly varied his language, in con- "formity to his own views; that these views, thus declared, "ought not to be controuled by implications, and disappointed "by additions, subtractions, changes, or transpositions, supposed "to be more agreeable to his mind; that this would be to make "wills, not to interpret them; that the construction, in favour of "the respondent, is more easy and natural than that in favour of "the appellants, and is much recommended, by not offering such "violence to the expressions of the testator."

The counsel for the respondent have insisted on this construction with a great force of argument, drawn from reason and authorities. We have, therefore, thought fit to employ a considerable time in our deliberations upon this cause.

It is agreed, by the counsel for the appellants and for the respondent, that the intent of the testators ought to govern in the construction of wills, except where a disposition is made contrary to law. As there is no such disposition now in question, the sole inquiry is, *What was the intent of the testator?*

This intent is to be collected from the entire will, and not from any disjointed parts. Technical terms are not necessary for conveying it; and, if such are used, their legal acceptation may be controuled by other words, plainly declaring the meaning of the testator. 2 *Black.* 379. 2 *Burr.* 770. 1 *Vez.* 142. *Doug.* 309. 327. *Cowp.* 239. 659. *Vin. tit. Devise*, 181. No words are to be rejected, that can possibly have any sense assigned to them, not incompatible with clearer expressions, or manifest general intent. *Cases tempt. Talbot*, 29. 6 *Mod.* 112.

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In the present instance, the testator, at first, certainly gives a fee simple to his son *William*: yet, if the devise over to *Francis*, "if *William* should die without heirs," is a substantive clause, independent of the next foregoing clause that begins with the words, "if any one of my aforesaid children should die before "they come to lawful age," the fee simple is turned into a fee tail. On the other hand, if these two clauses are but parts of one continued sentence, through the whole of which, the testator's disposing design holds on uncompleted until the conclusion, then the fee simple remained in *William*, with an executory devise to *Francis*, dependent on the event of *William's* "dying without "heirs" *of his body, and* "before he came to lawful age." 1788.

It has been strongly objected, by the respondent's counsel, "that the construction, urged for the appellants, breaks through "the words of the will, to let in an estate by implication, under "the notion of a power being vested in judges to determine the "intention of the testator, by adding to, or taking from, his "words; a construction, so severe, that it may well be compared "to the bed of *Procrustes*; if the expression is too short, rack it "out; if too long, lop off part."

The power of judges would, indeed, be as exceptionable as it is represented to be, if as extensive as it is supposed to be, in the objection: but, the alteration of words, by judges, in considering wills, are not made, strictly speaking, *to discover* the intention of testators, but only *to express it properly when discovered.* They do not introduce a supposed intention, but wait upon the true intention.

It was observed, in answer to this objection, by the learned gentleman who replied for the appellants, "that the respondent's "counsel themselves, make use of implications in sustaining their "own construction; for, in order to form the estate tail asserted, 'by them to be limited to *William Bagwell*, they are obliged to "this clause, 'and, likewise, if *William Bagwell* should die with-'out heirs,' to add these words, *of his body;* and again, to render "their construction consistent with reason, they are compelled to "allow that the limitation over to *Francis*, gives him a fee tail "*according to the intention of the testator*, though only an estate "for life *according to the words of the will.*"

There is great weight in this observation. It proves the will to be so defective in expression, that, though the two parties are led into opposite deductions, yet each of them is under a necessity of being guided by implications. Nor, is the use of implications, while bounded by legal limits, to be condemned; because, they are to be admitted only for effectuating the general intent of testators. 1 *Burr.* 50, 51.

We must, therefore, still recur to the original question, What was the intention of the testator?

1788. The attempt of the respondent's counsel, to show, that *William* was of age at the making of the will, is ingenious. However, the fact is not found, and we cannot suppose it. Indeed, it appears to be contradicted by these words, "All the rest of my personal "estate I give unto my wife and my six aforesaid children, to "be *equally divided* among them, to them, and their heirs, for- "ever, viz. *Thomas*, *William*, *Francis*, *John*, *Ann*, and *Valiance* "*Bagwell*. I set my boys at age at eighteen, and girls at six- "teen, and *their* estate *to be divided presently* after my decease, "by my friends, &c. whom I leave as overseers over my chil- "dren, &c." Here the word "*their*" plainly refers to his "*boys*" under eighteen, and the words "*estate to be divided presently*, &c." refers to the foregoing words, "*to be equally divided among* "*them*, &c." and as *William* is named as one of the "*six afore-* "*said children*," among whom the residue of the personal estate was thus "*to be equally divided*, &c." he and the other five children seem to be classed together, as being all under age.

It is true, that these words, "if *any one* of my aforesaid chil- "dren should die before they come to lawful age, their lands *to* "*go* to the survivors," do not prove, by their relation to what went before, that *William* was then under age, though he was one of the "aforesaid children:" for, as was observed by the respondent's counsel, the words may well be satisfied, if only some of them were under age. But these words, taken in connexion with those that precede, and, with those that follow them, acquire a very different and a decisive force.

The directions, at first, are only *general*, relating, *without name*, to "any one of the aforesaid children," and *without distinction*, "to the survivors." These general terms are immediately succeeded by this explanatory specification; "*that is*, if "*Thomas* should die before he comes to lawful age, I give his "share of land where *William* now lives, to my daughter *Eliza-* "*beth Tilney*, to her, and her lawful begotten heirs of her body, "forever; provided *Thomas* have heirs before he comes to law- "ful age, then to him, and his heirs, forever; *and*, *likewise*, if "*William Bagwell* should die without heirs, *to go* to *Francis*; "and if *Ann* should die without heirs, *to go* to *Valiance*, and if "*John* should die before he come to lawful age, without heirs, "then his share of land here, where I now live, I give to my "daughter *Comfort Leatherberry*, to her and her lawfully begot- "ten heirs of her body, forever."

Construing these words, "*that is*," according to the common manner of speaking, and so they ought to be construed, it is plain, that the testator designed in his subsequent words to be more particular, or exact, than he had yet been, and as in *these* he mentions *William* again, and makes a substitution in case of *his* dying, it is evident, that *William* was meant, by the testator, as "*one*"

"*one*" of his "*aforesaid children*," whose lands, if they "*should* 1788.
"*die before they came to lawful age*," should "*go to* the sur-
"vivors."

It is remarkable how much pains the testator employed, in this part of his will, to prevent his meaning from being mistaken. In the limitation over, if *Thomas* should die, he applies his former direction thus: "that is, if *Thomas* should die before he comes to lawful age, I give his share of land to my daughter *Elizabeth Tilney*, &c." And then to guard against a misconstruction of these words, whereby *Thomas*'s issue might be disinherited, in case *Thomas* should die before he came to lawful age, leaving issue, subjoins, "provided *Thomas* have heirs *before* he comes to lawful age, then to him and his heirs forever."

No point of law can be clearer, than that this devise gives a fee simple to *Thomas*, with an executory devise to *Elizabeth Tilney*, if *Thomas* should die without heirs of his body, *and* before he should come to lawful age. Why should not the like provision be extended to the case of *William*, when the testator after this full exposition of his mind with regard to substitution, instantly adds, "*and likewise* if *William Bagwell* should die without heirs *to go* to *Francis*." The most obvious and natural construction of these words, is, that *William*'s estate should be no otherwise affected by the limitation over to *Francis*, than *Thomas*'s was by the limitation over to *Elizabeth*; though, perhaps, the testator also meant, that *Francis* should take such an estate as *Elizabeth* would take on a similar contingency.

This construction is further recommended by the consideration, that the limitation over to *Francis* is nonsense, it not being said, *what* is "*to go*" to him, unless it refer to the preceding words. The very imperfection in this part of the will carries strong evidence in it, that the testator at the instant of using this expression, united it in his idea to the antecedent part, especially as he employs the same peculiarity of phrase for transferring the estate in both places.

The beginning of this explanation states *Thomas* to be under age. The conclusion of it states *John* to be under age. Between these are comprehended the provisions respecting *William* and *Ann*. From first to last, the words are all connected by the word "*and*" without the intervention of any stop. If then the two extremes relate to persons under age, and are confessedly explanatory of the general directions first mentioned, the intermediate parts must also refer to persons under age, and be explanatory of the same directions as to them, for there is no period at which the explanation rests, before the end of the devise to *Comfort Leatherberry*.

We can easily account for inaccuracies in the testator's expressions, from sickness, hurry, want of knowledge or assistance: but, we cannot account for such an inequality of distributions as

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1788. is required by the construction in behalf of the respondent. The testator's offspring appear to be alike objects of his parental affection and providing care. Yet, what a needless, useless, and encumbering diversity of regulations is introduced, if *Thomas* took a fee simple, with an executory devise to *Elizabeth*; *William* a fee tail, with an estate for life, or fee tail limited to *Francis*; *Ann* a fee tail, with an estate for life, or a fee tail limited to *Valiance*; and *John* a fee simple, with an executory devise to *Comfort*?

On the contrary, the construction in favour of the appellants, gives a sameness of arrangements, correspondent with the sentiments of the father towards his children. Each son took an unfettered estate, that is, a fee simple in the part devised to him; of course, if any son "came to lawful age," he might dispose of his share as he pleased; if any son died, "before he came to lawful age," leaving issue, the estate went to that issue; but if any son died, before he came to lawful age, *and* without leaving issue, the estate went to the substitute. This, we believe, to have been the testator's design; and, we think, he manifested in it great prudence, and a paternal impartiality.

It has been observed, by the respondent's counsel, "that this "construction would carry the estate entirely from the descend- "ants of the testator into a strange family, and the respondent's "lessor would suffer the peculiar hardship of being stript of the "inheritance, though he is heir of the testator and of the de- "visee."

It is impossible to calculate hardships of this kind, amidst the mutabilities of human affairs. It is to be remembered, that *William Bagwell*, the devisee and heir of the testator, was succeeded by his son *William* and this *William* by his two daughters. Thus the construction of the counsel for the appellants, allows a fee simple to the heirs of the testator and devisee for several generations. About fifty years ago, as appears from the records of the *Orphan's Court*, the mother of the respondent's lessor obtained a partition with her brother *William* the second, of the lands devised by the testator to *William* the first, their father, as of an estate in fee simple, and the lands assigned to her for her share are held under that partition to this day. It would have been thought at that time extremely hard, if it had been insisted, that *William*, the grandfather of the respondent's lessor took in fee tail the lands devised to him by this will, that, therefore, upon his death, the whole descended to his son *William*, and that his daughter *Agnes* was not entitled, under our intestate acts, to any part of so large an estate. Now, the complaint is directly reversed, and the construction that enured to the great benefit of the mother, is reprobated by the son claiming under her title. Yet if either of the daughters of *William* the second had issue surviving, the same interpretation of this will would now suit the respondent's

dent's lessor, that, heretofore, was so advantageous to his parent. 1788.

The true construction of a will is to be collected from the words; and is not to be affected by collateral circumstances; consequently, not by events subsequent, remote, uncertain, and utterly unconnected with the contingencies alluded to in the will. 3 *Peere Will.* 259. *Salk.* 232. 235. 3 *Burr.* 1581. This rule cannot be departed from. The security of property, and the order of society, depend on an observance of the laws.

Our construction of this will, appears to us, to be strengthened by three considerations, which we shall now mention.

1st. It is very credible, that when a person undertakes to make a will, he means to dispose of *all* his property; and, though we do not perceive any sufficient reasons why this well-founded presumption might not be generally adopted as a guide in the interpretation of wills, especially in devises to *children* and other *lineal* descendants of the testator, (2) where the gifts dictated by fatherly affection, as its last acts of kindness, may justly be deemed as designed to be the most beneficial to the objects of it, if no restriction is declared; yet, it must be acknowledged, that we do not recollect any case where it has been so adopted. Judges, however, have availed themselves of short and slight intimations in wills to this purport; have exerted themselves to render the disposition commensurate to the intention; and have particularly relied on such words as are used in this will, "*for my worldly* "*estate*, &c." to prove, that the testator designed to devise *all* his interest in an estate. *Cas. temp. Talbot*, *Ibbetson* v. *Beckwith*. *Tanner* v. *Morse*, *Bernardist*. *Tuffnill* v. *Page*. *Cowp.* 355. 1 *Wilson*, *Grayson* v. *Atkinson*. 3 *Burr*. *Throgmorton* v. *Holliday*. This inference appears to be peculiarly apposite, where a question arises from various terms of limitation, or expressions tantamount, whether a devisee takes in fee simple, or in fee tail.

The respondent's counsel, though strenuous advocates for their client's pretensions, have been too candid to assert, that the estate given to *William*, and, according to their idea, contracted to an estate tail, should, on failure of his issue, expand into a fee simple in *Francis*. They say, "*Francis* was to take the like estate "that was limited to *William*, that is, an estate tail." Of course, a reversion would remain undisposed of by the testator, contrary to his design, manifested, not only by the preamble of his will, but, also, by the conclusion of it, in which last he uses these words,

(2) A remarkable distinction taken between a devise to a *child*, and a devise to a stranger, in *Croke Eliz. Fuller* against *Fuller*. In *Modern Cases in Law and Equity*, 132. it was held, that where a settlement is made by *a lineal* ancestor, in consideration of the marriage of his son, all the remainders to *his posterity* are *within the consideration* of that settlement: but when it is made by a *collateral* ancestor, after the limitations to *his own children*, all the remainders to his *collateral* kindred are *voluntary*.

"all

1804. "all the rest of my *personal* estate I give, &c." This clause, we believe, never would have been restricted to "his *personal* estate," if he had not been fully persuaded, that he had before disposed of *all his real* estate. *Cowp.* 307. 3 *Burr.* 1622, 1623.

2d. If it had been the intention of the testator, to give an estate tail to any of his sons, what reason can be assigned, why he did not use plain words for that purpose? He well knew even the technical terms for creating such an estate; and repeatedly employed them in limitations over to his daughters *Elizabeth* and *Comfort*, that to each of them being "to her and the lawfully begotten heirs of her body forever." But, such terms he never admitted in the devise to any of his sons, nor indeed to any of his unmarried daughters.

A case was quoted by the counsel for the respondent, from *Pollexfen*, to show, that where there is a variety of expression, there is a variety of intention. That case is very properly applicable here, for, difference of language, not otherwise to be accounted for, must certainly proceed from difference of meaning. 2 *Wilson*, 81.

3d. It is inconsistent with the testator's intention, to construe the devise to his son *William* to be a fee tail, because it is inconsistent with that meaning which he himself has affixed to the words of the devise. 2 *Ab. Ca. in Eq.* 298. 302. It is observable that the testator in the latter part of his will gives *personal* effects to the legatees "*and their heirs forever.*" Though these words in such cases are not necessary; yet they incontestably show the donor's opinion of their force, and demonstrate his determination to give *the most absolute estate* he could give. The same was his determination, as he used the same words, in the devise to his son *William*, and therefore the son took a fee simple.

The judgment of the Supreme Court reversed.

APPEAL

FROM NEW-HAMPSHIRE.

July 1760.

Deering, Appellant, *versus* Parker, Respondent.

(1) THIS was an appeal from *New-Hampshire*, heard before a Committe of the Privy Council (Lord *Mansfield* being one of them) on the 10th of *July* 1760. The facts were these: One *Parker* had given a bond to *Deering*, payable the 30th of *July* 1735, conditioned for the payment of 2460*l.* "*in good pub-*"*lic bills of the province of Massachusetts Bay, or current law-*"*ful money of New-England, with interest.*" There had been many payments made, and indorsed. About the year 1752, the defendant tendered a large sum, in the bills of credit then current in *New-Hampshire*, which the plaintiff refused, brought his action, and recovered judgment for the penalty in the bond, upon the verdict of a jury, in *December* 1758. After which the cause was heard in the Chancery of *New-Hampshire*, and the Court decreed for the sum of 354*l.* 6*s.* 9*d.* in bills of credit of *New-Hampshire*, new tenor, being the nominal sum due at the time of the tender, deducting the sums paid and indorsed. So that the Court went upon the principle, that the plaintiff should take the bills as tendered, and that the debtor was not bound to make good their depreciation, nor to pay in silver, or real money.

On the side of the appellant, or creditor, it was insisted, that the payment ought either to have been in bills of *Massachusetts Bay* (which, it seems, were all called in, and sunk, before the tender) or in silver money, agreeable to queen *Anne's* proclama-

(1) This report is taken from a collection of manuscript cases, upon authority, that appeared respectable when it was copied; but the name of the reporter is forgotten.

tion,

1760. tion, which, they insisted, was the true meaning of that clause, or part, of the condition, to wit, *current lawful money of New-England.* It was, also, claimed by him to have all the sums indorsed, reduced in nominal sums down to the value of silver at the time of giving the bond, to wit, 27*s.* per ounce.

On the side of the respondent, or debtor, it was urged, that current money of *New-England* then meant, and was understood to be, indifferently, the bills of credit of any, or either of the *New-England* colonies, received in that colony in payments. That, therefore, the tender was in the specie contracted for, and that the sums indorsed were not only of course, upon that supposition, equal to the sums expressed; but that the creditor, by indorsing, had agreed to, and accepted of, so much as the same expressed, in real, as well as nominal sums.

The Lord PRESIDENT and Lord MANSFIELD expressed themselves fully in favour of the creditor's construction of the words, "current lawful money of *New-England*;" to wit, that it did not mean bills of credit of any colony, but the words were put in contradistinction thereto. Lord MANSFIELD farther added, that he was clear, on the one hand, that the sums indorsed ought to be allowed according to the nominal sums, so indorsed, equal to the same sums of money mentioned in the bond, and that the plaintiff had no right to have the same, any way reduced or altered. On the other hand, his lordship thought that the tender was not good in any respect; for, not only because it was made in a species of currency different from that contracted for; but, also, because it was out of time, being many years after the time of payment was lapsed, and also without notice. "What (said his lordship) shall a man meet his creditor in the street unawares, and tender a debt to him! The chancery allows six months' notice of time and place to be given. The law of the province enabling the Court to turn itself into a Court of equity and to reduce the bond to the sum due by the *auditem*, was a very good thing; and what Sir *Thomas Moore*, in his time, laboured so hard to obtain an act of parliament for here. And because the Judges (with whom he had several conferences about the matter) were for retaining the old artificial way, he declared, that he would always grant injunctions in such cases. In the present case (his lordship continued) he was at no loss to determine, that the judgment ought to be reversed: but he was at a loss what rule to go by, in determining the quantum of the debt. Since the province bills contracted for, were called in and gone; with a desire to know the usage, he had inquired of Mr. *I.* a *New-England* gentleman (who had practised the law) and was informed that "when old tenor had been contracted for, it had been allowed to be tendered, although depreciated in value, if the tender was made in season. That

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towards the close of existence of old tenor and after it had been called in and sunk, when judgment was given for real money, this matter (of how much to give) was greatly agitated. Some were for giving the value of the old tenor, or bills contracted for, as it stood when the obligation was out, or the debt became due. Others would have it settled, as it was when at the last and worst period; and others again, were for taking a medium. But the more general method was to take the value of the bills, when they should have been paid by the contract." Lord MANSFIELD observed, that from this information, he had received much light, and was relieved from his difficulty. That much might be said, for taking as a rule the value of the old tenor, at the time set by the bond for payment. That, upon the mention of it, it struck him as the rule of right in general: but that, in the present case, the bond had been outstanding so very long, the bills of credit, which were the currency of the country, had, in the mean time, sunk gradually, and became, in some measure, every one's loss: and that, therefore, in this case, he thought the loss ought to be divided between them. 1760.

The BOARD, upon the whole, instead of taking the price of silver at the time of the contract, and time set for the payment, (which was about 27*s.* per ounce) fixed it at 37*s.* per ounce, and computed the debt accordingly. This made about 100*l.* sterling in favour of the appellant, by which he got the opinion of the Court in his favour; but, as no costs are allowed upon appeal, he could not be much a gainer by the general result.

MAYOR'S COURT.

April Session 1797.

The Commonwealth *versus* Schaffer.

THE defendant was indicted and convicted for forging the names of several soldiers to powers of attorney, authorising him to demand and receive, their warrants for the donation lands, granted by acts of congress, for services during the revolutionary war. *Dallas* observed, that as the question of the common law jurisdiction of the federal Courts, in criminal cases, had not been decided, it was his duty, as counsel for the defendant, (without declaring his own opinion) to bring it before the Court, on the present occasion. He, therefore, moved in arrest of judgment, that the offence, charged in the indictment, arises under a law, or laws, of the *United States*; and is exclusively cognizable in their Courts.

After argument, the *Recorder* stated the facts, authorities, and principles of the case, in giving the judgment of the Court.

WILCOCKS, *Recorder*. The offences charged against the defendant in the indictment, are forgeries, committed in *forging* the names of *Allen Fox*, *Ebenezer Drake*, *Robert Battersby*, and *Samuel Griswald*, to four several powers of attorney, to demand and receive from the *United States*, for each of them, 100 acres of land; they having all been soldiers, who enlisted to serve during the late war with *Great Britain*, and who served through the war; and, in consequence, under various acts of congress, each of them was entitled to a donation of 100 acres of land.

In support of this motion in arrest of judgment, made by Mr. *Dallas*, the constitution of the *United States* has been cited. *Art.* 3. *s.* 2. *p.* 12. *The Judiciary Act of Congress*, *s.* 9. *p.* 97. *s.* 11. *p.* 98, 99. *s.* 34. *p.* 112. 2 *vol. Resolves of Congress*, 16*th Sept.*

Sept. 1776. *p.* 357, 8. *p.* 361. 18*th Sept.* 1776. *p.* 365. 20*th* 1797.
Sept. 1776. *p.* 456. 12*th Nov.* 1776. *p.* 438. 30*th Oct.* 1776.
Laws of U. S. p. 151. *s.* 14. *Const. U. S. art.* 1. *s.* 8. 4 *Black. Com.* 245.

It has been contended that, under the 2d section of the 3d article of the constitution of the *United States*, its judicial power extends, *inter alia*, to all cases arising under the constitution and laws of the *United States*.

By the resolutions of congress in 1776 referred to, it was shown, that the soldiers, who enlisted to serve during the war, and served to the end of it, were, individually, entitled to a donation of 100 acres of land from congress.

It has been said that an inspection of the indictment will show, that the crimes charged against the defendant, consisted in forging certain writings, which, by the rules of office, were necessary to obtain from congress the soldier's right to lands. For this reason, and because the soldier's rights to lands are derived under the resolves or acts of congress, the conclusion is drawn, that a state Court has no cognizance of this crime, because it arises out of a law of the *United States*.

The 9th section of the judiciary law of the *United States*, it is alleged, gives to the District Court, *exclusive of the state* Courts, cognizance of all crimes and offences that shall be cognizable under the authority of the *United States*, where the punishment is whipping under thirty stripes, &c. And *s.* 11. *p.* 99. gives to the *Circuit Court exclusive* cognizance of all crimes and offences cognizable under the authority of the *United States*, except where that act otherwise provides, or the laws of the *United States* otherwise direct.

It was contended that, for the reasons before recited, showing that the offence arose out of a law of the *United States*, that, therefore, the Courts of the *United States* had cognizance of it. And that, by the 9th and 11th sections of the judiciary law, their cognizance was declared to be exclusive of the state Courts, unless otherwise provided by that, or some other, law of the *United States*; and it was said that no such provision had been made, therefore the conclusion was, that the state Courts had no jurisdiction of this offence.

In answer to an objection, that the laws and constitution of the *United States* no where defined the crime of *forgery*, in such manner as to comprehend the offence charged in the indictment; nor was the common law of *England*, relating to crimes and offences, extended to the *United States*; nor was there any law of the *United States* which prescribed a punishment for *forgeries* generally:

The act of congress for punishing certain crimes against the *United States*, *Laws of United States*, *s.* 14. *p.* 151. and against forgery of *indents* or *public securities* of the *United States* were cited,

1797. cited, and the judiciary law, *s.* 34. *p.* 112. which says that the laws of the *several states*, except where the constitution, treaties, or statutes, of the *United States*, shall otherwise require, shall be regarded as the rules of decision, in trials at common law, in the Courts of the *United States*.

It has been inferred from hence, that the rule of punishment, in this case, would be the rule of the common law if it obtained in the state, or such rule as the law of the state provided. 4 *Bl. Com.* 245. has been referred to for the definition and punishment of forgery at the common law.

Henfield's case has been referred to, which was an indictment in the Circuit Court of the *United States*, for a misdemeanor; that he, being a citizen of the *United States*, entered on board a *French* privateer, to cruize against the *British*, with whom the *United States* were at peace under a treaty.

Ravara's case was, also, cited, who was a consul from the state of *Genoa* to the *United States*, and indicted in the District Court of the *United States*, for a misdemeanor in sending a threatening letter to *Benjamin Holland*, for the purpose of obtaining money from him.

It was said, that there was no act of congress which either defined the offence, or the punishment, in those cases; but it was said, that the common law would give the rule for both.

It was argued, that whatever was necessary to the existence of the *United States*, must not depend upon the state Courts. That this offence was committed in prejudice, and to the injury, of the *United States*, and, therefore, the jurisdiction of it belongs to the Courts of the *United States*.

That under the constitution of the *United States*, no power is given to punish the offence of stealing records, robbery, perjury, and the laws of congress, *p.* 153. prescribe the punishment of these offences, in particular cases.

As the laws of congress have made provision, in these cases, without any power given by the constitution expressly for the purpose; in the same manner, the authority of congress is competent to declare, by law, how the offence charged against *John Schaffer*, shall be tried and punished. And, therefore, it is an offence not of state cognizance, but ought to be tried in the Courts of the *United States* only.

Mr. *Ingersoll* and Mr. *Thomas*, in support of the jurisdiction of the Court, referred to the following authorities. *Const. of U. S. art.* 3. *s.* 2. *art.* 1. *s.* 8. *p.* 8. *No.* 10. 12*th Amend. Const. U. S. Resol. of Cong. vol.* 8. *p.* 289. 4*th July* 1783. *Ib. vol.* 10. *p.* 366. 1*st Aug.* 1786. *Ib. vol.* 12. *p.* 114. 23*d July* 1787. 2 *vol. Laws of Cong. p.* 49. 52. 154. 2 *vol. Federalist, p.* 323, 324. *Const. U. S. art.* 1. *s.* 8. *No.* 6. *Laws of U. S. s.* 16. *p.* 151.

From

From these sources, a system of argument has been drawn, which, as it has been generally adopted by the Court (in the sentiments they have formed) I shall forbear to state it minutely, but proceed to deliver the opinion of the Court on the case before them. 1797.

The soldier who enlisted to serve during the war, and afterwards continued to serve to the end of it, had a right to demand and receive from the *United States*, a promised donation of 100 acres of land. This right had its inception under several resolutions of congress, passed in the year 1776, and it became a perfect right at the close of the war in the year 1783.

The commonwealth of *Pennsylvania*, for a long course of time before the revolution down to the present day, has always had subsisting laws, competent to the trial, and punishment, of every species of forgery that could be fabricated. In the year 1789, when the constitution of the *United States* was completely organized, it found this commonwealth in full possession of *jurisdiction* over this forgery. And as offences on this subject may have occurred after the peace, and before the existence of the present constitution, it is possible that some instances of prosecutions on similar papers, may have taken place in the Courts of this state, before the establishment of it, as several have been known to take place, in this Court, since that period; particularly in the cases of *Dixen*, and *M'Conchlan and Wife*.

The important question is, What has been the effect of the constitution of the *United States* (and the laws which have been enacted under it) to divest this commonwealth of a jurisdiction of which, at the time it was made, it found the state constitutionally possessed.

The 1st and 3d articles of the constitution of the *United States*, principally affect this question; they respect the legislative and judicial powers, and contain an extensive enumeration of subjects, whereon their legislative power may be exercised, and to which the judicial power shall extend, and it is reasonable to say, that there may be powers which are not enumerated in it, but ought to be considered as granted by the constitution; for instance, those (if such there be) which are essential to the independence of the government, to its protection and defence, to such as grow out of the constitution, and out of the *constitutional laws of Congress*.

If it be true, that this offence may be considered as growing out of an act of congress, because, if congress had never engaged to give lands to soldiers of a particular description, there never could have been a forgery of such a power of attorney: yet, it still remains a question, whether, under all existing circumstances, this court has jurisdiction.

If the authority of congress is competent to declare the false making such a paper to be a crime of *forgery*, to prescribe its punishment,

1797. punishment, and to appoint the place of trial to be in the courts of the *United States*, exclusively of the state courts; yet, on examination, it will be found, that congress has not, by any act, legislated on any of these points. No act of congress, has, either definitely or by general description, made the false fabrication of such a writing to be a forgery, nor has any act declared how such a forgery or forgeries, generally, shall be punished. No act has given jurisdiction to any court, either concurrent or exclusive, to try the crimes of forgeries generally.

If these positions be true, they tend to shew it doubtful, whether, at this day, under the existing laws of the *United States*, this forgery could be tried and punished in their courts; however, future laws may make them so.

To say that the constitution of the *United States*, operated any abridgment of the jurisdiction of the state courts, as to crimes generally, of forgery, perjury, larceny, merely because they related to the interest or concerns of the *United States*, or their officers, acting under their laws, before they themselves, by their own acts, shall have provided for the punishment of such crimes, and taken order as to the jurisdiction of them, would lead to this consequence, that for a time, consistent with such doctrine, some crimes would, by law, be subject to no prosecution or punishment.

In the 2d vol. of the *Federalist*, page 323, 324. which may be called a commentary on the constitution of the *United States*, contemporary with it, it is held that "the states retain all pre-"existing authorities which may not be exclusively delegated to "the federal head; and that this exclusive delegation can only "exist in one of three ways; 1. where an authority is in express "terms granted to the union; 2. or where a particular authority "is granted to the union, and the exercise of a like authority is "prohibited to the states; 3. or where an authority is granted to "the union, with which a similar authority in the states would "be utterly incompatible. Though these principles may not apply "with the same force to the judiciary as to the legislative power, "yet I am inclined to think, that they are, in the main, just, "with respect to the former as well as the latter; and, under this "impression, I shall lay it down as a rule, "That the state courts "will retain the jurisdiction they now have, unless it appears to "be taken away in one of the enumerated ways."

Page 324. "I am even of opinion, that, in every case in which "they are not expressly excluded by the future acts of the na-"tional legislature, they will, of course, take cognizance of the "causes to which those acts may give birth."

But the present case is not one of those which comes within the exceptions of that writer. 1st. The jurisdiction of this crime is not exclusively granted to the union. 2d. It is not prohibited to the states. 3d. Nor, if it is granted to the union, is it a case where a similar authority in the states would be incompatible.

In

In the act of congress, *p.* 147. "for the punishment of certain crimes," the murders, or larcenies, there mentioned, are such as may be committed within forts, arsenals, dock-yards, federal district, places ceded by the states to the *United States*, or upon the high seas, perjuries in their own Courts of justice under any act of congress, forgeries of indents or public securities. In general they are those subjects submitted by the constitution to be legislated upon by them, and made subject to their judicial authority. Congress having exercised their power over many subjects submitted by the constitution, and to some arising under their laws; but never having touched the present subject, of which this state had a pre-existing cognizance, it may be considered as *casus omissus* by their laws; and until they shall, by some future act, exercise their authority over the subject by designating the crime, prescribing the punishment, and giving to the Courts of the *United States* exclusive jurisdiction, this Court may, constitutionally, take cognizance of the cause, and punish the offence, by the laws of this state. 1797.

Therefore the 11th section of the judiciary act, which gives to the Circuit Court exclusive cognizance of all crimes and offences cognizable under the authority of the *United States*, may be reasonably supposed not to have contemplated this case, which by no act of congress is designated as a crime, nor has it any appointed punishment.

The prosecution against *Henfield*, in the Circuit Court, was for a violation of his duty, as a citizen of the *United States*, in entering on board a *French* privateer, and cruizing against the subjects of the king of *Great Britain*, with whom the *United States* were at peace, under the sanction of a treaty. This was contrary to the law of nations, to the treaty, and against the constitution of the *United States*. This was not a crime resulting from the regulations of an act of congress.

Ravara was a public minister, a consul, and, therefore, the jurisdiction over him by the constitution was expressly to be exercised by the Courts of the *United States*. Neither of these cases rests upon the principles on which the present case stands, and, therefore, are no authorities.

The 34th section of the judiciary act, *p.* 112. which says that the laws of the several states, except where the constitution, treaties, or statutes, of the *United States* shall otherwise direct, shall be regarded as the rules of decision, in trials at common law, in the Courts of the *United States*, plainly refers to trials of a civil nature, according to the course of the common law, and not to the trial of crimes by the rules of the common law.

Upon this comprehensive view of the question, the Court are of opinion, that they are competent to the jurisdiction of this cause, and, therefore, do over-rule the motion that has been made in arrest of judgment, founded on the objection to their want of jurisdiction.

CIRCUIT COURT,

PENNSYLVANIA DISTRICT.

October Term 1805.

Present PATERSON, an Associate Judge of the Supreme Court.
PETERS, District Judge.

Thurston *versus* Koch.

THIS case is reported *ant. p.* 348.; but, I find, that Judge PETERS delivered his opinion at large; with a copy of which Mr. *Condy* has obligingly furnished me for publication.

PETERS, *Justice.* The point in this cause is, whether in a case of double insurance, the policies are to be taken according to priority; that is, whether the second is answerable before the first is exhausted, if the loss is greater than the sum covered by the first? And if the loss is fully covered by the first, whether, if it be paid by the insurers on the first, they can oblige those on the second to contribute, *pro rata?*

To be respectable abroad, and to facilitate and simplify mercantile business at home, we should have a *national*, uniform, and generally received, law-merchant. The custom, or practice, of one state differing, perhaps, from that of another, must yield to general and established principles.

There is, however, no custom of merchants, in this, or any other, district of the *United States*, stated in the case, and we cannot travel out of the statement, in giving our judgment.

I mention as an extraneous fact, of which I have been informed by persons intelligent in business of insurance, that the rule in *New-York*, where they followed the *British* practice for a great length of time, was variant from that they now use. The custom in *Philadelphia*, has been, for a long course of years, to settle losses, where there are double insurances, according to priority of

of policy in date, without regard to time of individual signature: that is, not to call on the second set of underwriters, if those on the first policy were competent, or had paid the amount of subscription, or loss. In this event, those on the second policy return the premium, retaining one half per cent. If this be so, and I have no reason to doubt, it is one of the very few subjects, in which I have been able to discover a decided and universal custom of merchants here. It may have originated, when the *British* rule was more similar to that of many other nations, than it is now, and was at the time of our revolution. It appears to me, that the custom here is agreeable to the general maritime custom and law of *Europe*, in this particular. The authorities produced in this cause, on the part of the defendant, warrant me, in this opinion. All the *European* nations, it is true, do not agree. There may not in every detail, be an exact conformity among any considerable number. But, I conceive, that where the greater number of particular laws are coincident in a general principle, this will establish what is called, *general law*. In the point before us, there are exceptions in the laws of *Spain*, and those of *England*, to what seems to be the general principle and rule, among other trading nations. And the arrangements of those two countries, differ from each other. 1805.

The law, or custom of merchants in *England*, was, formerly, more agreeable to the general custom and maritime law of other nations, than it has been decided, in latter times to be. It is contended, that the *British* authorities, do not shew direct decisions of *their courts*, on this point; yet, they are sufficient to satisfy me, of what the law there is. It appears to me to be clearly settled, as law, in *England*, that in cases of double insurances, if all the policies cover the same risques, there shall be a rateable contribution. It was so settled at the period of our independence. It was their law-merchant, which, being part of the common law, was binding on us; and is now engrafted into our maritime code. The cases, before our declaration of independence, clearly shew, that the law was then so settled. And in cases since that declaration, it is recognised and agreed to be the law. Our insurances in that country being still considerable, the rule is yet useful on that account, among others.

In *France*, agreeably to an ordinance of *Lewis* XIV. the first policy is to be exhausted, before the second operates, if dated at different times. But different policies, of the same date, are considered as one, and there is a rateable contribution.

In *Spain*, the date and time of individual subscription are attended to, and insurers are called on, according to priority of subscription, even on the same policy. I have had frequent occasions to recur to *Spanish* regulations. There is, in most of the *Spanish* maritime laws and customs, a peculiarity which creates an exception, rather than a rule, on many general principles.

1805. I cannot see, that it will be materially disadvantageous to commerce, to settle this question, in either way, contended for in this cause. It is of most importance, that the point should be clearly decided and settled in one or the other way; that merchants may know, and accommodate their affairs to the decision. This court can, at least, commence the means of final decision.

I believe with Professor *Smith*, in his "*Wealth of Nations*," cited in this cause, that distributing the burthen of losses, among the greater number, to prevent the ruin of a few, or of an individual, is most conformable to the principles of insurance, and most conducive to the general prosperity of commerce. The wisdom and experience of the *British* nation, grown out of their more modern and extended state of commerce, have given additional value to this opinion. Whatever respect (and it is not slight), I may entertain for the laws of other nations, I deem myself bound to follow, what was the established law and custom of merchants in *England*, at the time of our becoming an independent nation: not because it was the law merely of that country; but because, *it was, and is, our law.*

There is sufficient evidence in my mind, in the cases produced out of the *British* books, to this point, to satisfy me of the law and custom there established on this question. I, therefore, conclude, according to the case of *Newby* v. *Reed*, (*Sir Wm. Bl. Rep.* 410.) that "the insured may recover the whole sum; and leave the in-"surer to recover a rateable proportion, from other insurers, on "a double policy," and the insured may elect, which set of insurers, or which of the individuals, he will sue, for the amount of actual loss; beyond which he cannot recover, as he can have but one satisfaction.

On the point stated, (the details of which merchants can best adjust) I am of opinion, that the defendant is liable to pay to the plaintiff, a contribution, upon the loss paid by him, as stated. This contribution must be made by all the insurers, on all the policies rateably, as their respective subscriptions bear a proportion to each other, and all of them to the actual loss. The defendant of course, must pay to the plaintiff his rateable proportion, on these principles, according to the amount of his subscription.

Willing *et al. versus* The United States.

SINCE this case was reported, (*ante. p.* 374), at *February* term 1807, the Supreme Court, upon argument, affirmed the judgment of the Circuit Court.

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